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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

MISSISSIPPI

AT THE

MARCH AND OCTOBER TERMS, 1914.

VOL. 107

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ROBERT POWELL

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1914.

NEW ORLEANS M. & C. R. Co. *v.* E. H. & E. L. CARTER.

[64 South. 842.]

CORPORATIONS. *Reorganization. Action against reorganized company. Railroads. Mortgages. Liabilities. Scope of relief. Code* 1906, *section* 4067.

In a suit brought against a new corporation on the theory that it was simply a reorganization of an old corporation, which was liable to plaintiff, the agreed statement of facts was held by the court not to show that the new corporation was a reorganization of the original corporation and liable for its debts.

ON SUGGESTION OF ERROR.

RAILROADS. *Mortgages. Liabilities secured. Scope of relief. Code* 1906, *section* 4067.

Code 1906, section 4067, providing that "a mortgage or deed of trust conveying the income of future earnings or the rolling stock of

a railroad company shall not be valid against liabilities incurred by such company as a carrier of freight and passengers, or for damages sustained by persons or property," has no application, in a suit against a railroad company based on the theory that it was a reorganization of a company liable to complainants, where under the agreed statement of facts such a theory is not sustained.

APPEAL from the chancery court of Jones county.

HON. SAM WHITMAN, JR., Chancellor.

Bill in chancery by E. H. and E. L. Carter against the New Orleans, Mobile & Chicago Railroad Company. From a decree for complainants, defendant appeals.

Appellees were complainants in the court below, and appellant defendant. Suit was begun by a bill in chancery filed by complainant below, alleging that the Mobile, Jackson & Kansas City Railroad Company was indebted to complainants, and that after becoming so indebted to complainants the Mobile, Jackson & Kansas City Railroad Company ceased as a common carrier of freight, and no officer or agent of said railroad company could be found in Mississippi upon whom process could be served, and that the defendant, the New Orleans, Mobile & Chicago Railroad Company, had taken possession of the property of the Mobile, Jackson & Kansas City Railroad Company and converted it to its own use, and was operating the road formerly operated by the Mobile, Jackson & Kansas City Railroad Company, and that in fact the new company was merely a reorganization of the old company, and therefore liable for its debts.

The defendant answered, denying that it was a reorganization of the Mobile, Jackson & Kansas City Railroad Company, but that it was an entirely separate corporation, and was a *bona fide* purchaser of the assets of the Mobile, Jackson & Kansas City Railroad Company for value; the assets of the last-named company having been sold under foreclosure sale to satisfy an indebtedness due the bondholders, and having been purchased at

said foreclosure sale by one Laing, who afterwards conveyed the property to the defendant.

The case was tried on the following agreed statement of facts, and resulted in a decree for complainants:

"Agreed Statement of Facts.

"That complainants are a copartnership, composed of E. H. Carter and E. L. Carter, who were then, and are now, residents of the city of Meridian and citizens of the state of Mississippi. That on the 6th day of January, 1909, complainants were conducting a cotton brokerage business in the state of Mississippi, with their headquarters in the city of Meridian.

"That during the month of January, 1909, complainants, through one of their agents, a W. R. Hart, of Philadelphia, Mississippi, bought from one C. C. Briggs, fifty bales of cotton and paid the said C. C. Briggs therefor. That part of said bales of cotton so purchased from said C. C. Briggs was in the compress at Philadelphia, Mississippi, and for the remaining bales said C. C. Briggs delivered to complainants bills of lading calling for the same. That among the bills of lading delivered to complainants at that time by said Briggs, to cover the said fifty bales of cotton purchased by complainants as aforesaid, was one issued by the Mobile, Jackson & Kansas City Railroad Company, dated Noxapater, Mississippi, January 6, 1909, for 'three bales of cotton,' aggregating one thousand five hundred pounds. A copy of said bill of lading is filed as an exhibit to complainant's bill, and the original is attached hereto. That complainants demanded said three bales of cotton from said Mobile, Jackson & Kansas City Railroad Company, but has never received the same. That complainants purchased said cotton, as aforesaid, in good faith, paid for the same, and were delivered bill of lading by said C. C. Briggs, without any knowledge of the fraud complained of by defendant.

"That the said C. C. Briggs procured said bill of lading from said Mobile, Jackson & Kansas City Railroad

Company through fraud, by representing to the agent of said railroad company at Noxapater, a station on the line of said railroad company, that the three bales described in the bill of lading were the property of said C. C. Briggs, when as a matter of fact said C. C. Briggs did not own the same, nor has ever owned said three bales, but that said cotton actually belonged to, at that time, another party, one F. L. Kilpatrick. That said C. C. Briggs was afterwards indicted, tried, and convicted, and served a sentence in the state prison, for said false representations in securing said bill of lading.

"That at the time of the issuance of said bill of lading said Mobile, Jackson & Kansas City Railroad Company was a railroad corporation in this state, and was a common carrier of freight and passengers through the state between Middleton, in the state of Tennessee, and Mobile, in the state of Alabama, which line passed through the city of Laurel, Second district, Jones county, Mississippi. That after the issuance of said bill of lading, and before the filing of this suit, to wit, November 11, 1911, the property of said railroad company (which is fully described in the papers of record, and which are made a part of this agreement) was sold to satisfy a mortgage, and that one J. A. Laing purchased the same, which deed is of record in the office of the clerk of the chancery court of Second district, Jones county, Mississippi, in Book C, page 157. That said Laing conveyed said property to this defendant. See deed in Office Book C, page 161. That defendant took over all the rolling stock, etc., described in said deeds, which was formerly owned by the Mobile, Jackson & Kansas City Railroad Company, the company that issued the bill of lading referred to herein.

"It is agreed that said cotton weighed one thousand five hundred and thirty-nine pounds and was worth nine and seven and one-half hundredths cents per pound, or one hundred and thirty-nine dollars and sixty-six cents, at that time.

Flowers, Alexander & Whitfield, attorneys for appellant.

Shannon & Street, attorneys for appellees.

COOK, J., delivered the opinion of the court.

This case was begun in the chancery court upon the theory that appellant, the New Orleans, Mobile & Chicago Railroad Company, was organized by the stockholders and bondholders of the Mobile, Jackson & Kansas City Railroad Company for the purpose of acquiring the assets of the latter company; that the organization of the New Orleans, Mobile & Chicago Railroad Company was in fact merely a reorganization of the Mobile, Jackson & Kansas City Railroad Company; that, this being so, the new company was bound to pay the debts of the old company. It is alleged that the old company owed appellees one hundred and thirty-nine dollars and sixty-six cents, and the prayer of the bill of complaint was for a decree for that amount against the new company. The case was tried upon an agreed statement of facts, and the court granted the relief prayed for; wherefore this appeal.

The facts tend to show that appellant acquired the property through a foreclosure sale ordered by the United States courts of Mississippi and Alabama. This sale was ordered at the instance of the bondholders of the old company, and so far as we are able to discover the proceedings were regular, and there is nothing in the record which authorized the lower court to infer that the new company was merely the old company under another name. It is true that some of the recitals in the deeds conveying the property to appellant suggest a suspicion that the allegations of the bill of complaint may be true; but we do not think these suspicions rise to the dignity of proof, nor do they shift the burden of proof to appellant to establish its *bona fide* ownership of its property.

It appears that the property of the old company was sold by the decree of courts of competent jurisdiction to pay the mortgage indebtedness of the company; that the property was bought by an individual, and by mesne conveyances appellant has title to same. If the facts are as appellees charge, they may be entitled to relief; but the facts must be proven.

Reversed and remanded.

ON SUGGESTION OF ERROR.

At a former day of this term this case was reversed, for reasons stated in the opinion of the court. The case is again before us on suggestion of error.

It is insisted that the chancery court was right in rendering a judgment against appellant because of section 4067, Code of 1906, which is in these words: "A mortgage or deed of trust conveying the income of future earnings or the rolling-stock of a railroad company shall not be valid against liabilities incurred by such company as a carrier of freight and passengers, or for damages sustained by persons or property." We are urged to construe this section, and it is claimed that a failure to do so has led the court into an erroneous decision.

We have not regarded it necessary to take into consideration this section of the Code, for the reason that it in no way affects the case made by the pleadings and agreed statement of facts. The bill of complaint proceeds upon the theory that appellant railroad company is in fact the old company under another name, and a decree was asked and obtained against appellant, based upon a claim against the old company. We did not believe, and do not now believe, that the agreed facts support the allegations of the bill of complaint. There is no evidence to show that appellant is a reorganization of the old company, or that the old company and the new company are one and the same company, and unless this is true we cannot see how a judgment could be rendered against the present company for the debts of the defunct company.

Section 4067 of the Code needs no construction, and we have not attempted to construe same, for the simple reason that it does not come into play in this case. The rolling stock of the old company may be subjected to the payment of the debts of the old company, but the bill in this case does not seek to do this. The decree sought by the bill and rendered by the court is a simple judgment for so much money against appellant.

Suggestion of error overruled.

FLORIAN DEDEAUX *v.* LORANCE CUEVAS *et al.*

[64 South. 844.]

1. DEEDS. *Bona fide purchaser. Equitable title. Vendor and purchaser. Recordation of deed.*

A purchaser of land only acquires an equitable interest, where his vendor did not hold the legal title, but only an agreement from the holder of the legal title to convey him the property.

2. BONA FIDE PURCHASER. *Recordation of deed. Code* 1906, *section* 2788.

Section 2788, providing that every conveyance shall take effect as to all subsequent purchasers for a valuable consideration without notice, only from the time recorded, applies only where the purchasers for a valuable consideration without notice, therein referred to, are purchasers of the legal title or estate and not purchasers of a mere equitable title or estate.

3. VENDOR AND VENDEE. *Maxims.*

In a contest between two purchasers each holding an equitable title to land the one first in time should prevail under the maxim, that where there is equal equity the first in time prevails.

4. SAME.

In a contest between two purchasers each holding an equitable title to the land and one acquires the legal title also, he should prevail under the maxim that where there is equal equity the law prevails.

APPEAL from the chancery court of Harrison county.

HON. T. A. WOOD, Chancellor.

Bill by Florian Dedeaux against Lorance Cuevas and others. From a decree dismissing the bill and granting the relief prayed for in defendants' cross-bill, complainant appeals.

This suit was begun by a bill in chancery, filed by Florian Dedeaux against Lorance Cuevas and others, heirs at law of Mary Cuevas, for the purpose of canceling a deed from the Gulf Coast Lumber Company to Mary Cuevas, and to cancel all claim of right, title, and interest of the defendants, as heirs of said Mary Cuevas, to the property described in the bill. The record shows that complainant held a deed from the Gulf Coast Lumber Company, dated July 19, 1904, and filed for record on the same date. The deed from the Gulf Coast Lumber Company to Mary Cuevas was dated September 4, 1903, and filed for record April 20, 1907. The record also shows that the Gulf Coast Lumber Company did not hold the legal title to the land in controversy, but only held an agreement from J. T. Jones, the holder of the legal title, to convey said property. On October 24, 1908, after this suit had been filed, J. T. Jones executed a quitclaim deed to Mary F. Cuevas, her heirs and assigns, which recited that said Jones had contracted to sell the Gulf Coast Lumber Company the land in question, and, whereas, the said Gulf Coast Lumber Company had afterward executed a deed to Mary F. Cuevas to said land, therefore, in consideration of one dollar, the grantor quitclaimed the land to Mary F. Cuevas, her heirs and assigns. The defendants answered, setting up the above facts, and made their answer a cross-bill, praying that the claim of title of appellant be canceled as a cloud. The chancellor dismissed the appellant's bill, and granted the relief prayed in the cross-bill.

It is insisted by appellant that, since his deed from the Gulf Coast Lumber Company was filed for record prior to

the deed of appellees, his title is superior, since both deraigned title from the Gulf Coast Lumber Company, the common source, and that, since he is a purchaser for value without notice, section 2788 of the Code of 1906 controls. Said section provides: "Every conveyance, covenant, agreement, bond, mortgage and deed of trust shall take effect as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors, only from the time when delivered to the clerk to be recorded." Appellees contend that, since the only title which the Gulf Coast Lumber Company had to the land in question was an equitable title, their deed from the Gulf Coast Lumber Company, being first in time, entitles them to prior equity; they having subsequently also acquired the legal title.

Mize & Mize, attorneys for appellant.

M. B. Brown, attorney for appellees.

The record has been lost in this case.

SMITH, C. J., delivered the opinion of the court.

The titles, if any, acquired by the parties hereto by reason of the purchases from the Gulf Coast Lumber Company, are equitable and not legal, consequently section 2788 of the Code has no application, for the reason that the "purchasers for a valuable consideration without notice" therein referred to are purchasers of the legal title or estate, and not purchasers of a mere equitable title or estate. *Wailes* v. *Cooper,* 24 Miss. 208.

The equities of all of the parties hereto being equal, that of appellees must prevail, for the reason that it was first in time, and for the further reason that they have also acquired the legal title. "Where there are equal equities, the first in time shall prevail." "Where there is equal equity, the law must prevail."

Affirmed.

AMERICAN FUNDING CORPORATION v. A. J. PENNINGTON.

[64 South. 845.]

1. BILLS AND NOTES. *Action by indorsee. Right of recovery. Defenses. Bona fide purchasers.*

Where a purchaser of land gave his note for the purchase price under a contract providing that when the purchase price was paid in full the vendor should execute a full warranty deed to the purchaser, it was not necessary for the *bona fide* endorsee of said notes to tender a deed in order to obtain judgment on the same.

2. BILLS AND NOTES. *Defenses. Bona fide purchaser. Burden of proof.*

In a suit on such notes by the indorsee the burden of proof was on the maker to establish that he has equities or defenses to the notes and that the endorsee has due notice thereof.

APPEAL from the circuit court of Lauderdale county.

HON. J. L. BUCKLEY, Judge.

Suit by the American Funding Corporation against A. J. Pennington. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Baskin & Wilbourn and *W. C. Sams,* for appellant.

The defendant, the appellee herein, attempts to defend on the ground that a deed to said property was not tendered by the Montray Realty Company but by the appellant herein. We would respectfully submit that neither of said attempted defenses can avail anything to the said appellee herein.

It seems that said appellee relies on the case of *Geo. H. Paul Company,* appellants, v. *C. W. Shaw,* found in 27 L. R. A., New Series, p. 1123.

This case is not in line at all with the case at bar, nor even analogous. In the last-cited case the appellant was the original payee and tendered a deed from a stranger to the appellee, the defendant in the lower court; also,

said appellant was a party to the contract for the sale of land in the above case. In the case at bar, the appellant is not the original payee of the notes sued on, neither is it a party to any contract with the appellee herein. If the Montray Realty Company, the original payee of said notes in this cause, and a party to said contract set out in the record, had brought suit upon said notes, and if it had tendered to the appellee herein a deed from a stranger, then this case would be in some respects similar to the case above cited and relied upon by the appellee herein; but as it is considering the facts in this and the cited case, we submit that the two cases have no similarity, and are not even analogous, and that the *George H. Paul Company* v. *C. W. Shaw case* cannot be relied upon successfully by the appellee herein, especially in view of the Perkins case above referred to and decided by this court, number 15,586.

By way of recapitulation, the appellant's rights are governed by the law of the District of Columbia, and the record discloses that according to the law of the District of Columbia the appellant was a *bona fide* holder of said notes sued upon, was a holder for value before maturity, without any knowledge of defects in the title, or of any defenses that the appellee might have against the original payee; that said appellant was without notice of any such defects and was not guilty of fraud. Also, the burden is upon the maker of the notes to show that appellant was not a *bona fide* purchaser for value of said notes; that all legal presumptions are in favor of the appellant and that this burden of proof on the appellee has not been by him sustained, nor has said appellee overcome the said presumption in favor of appellant.

We respectfully submit that the ruling of the lower court should be reversed and judgment rendered in this court for appellant.

F. V. Brahan, for appellee.

I submit that this case on the record, is controlled and governed by the case of *George H. Paul Co.* v. *S. W. Shaw* reported in "Lawyers Reports Annotated," volume 37, New Series 1912, and the superb note following: I don't gainsay the proposition that our "Anti Commercial Statute," sec. 4001, of Code of 1906, and the annotations thereunder and the latest holding of this honorable court in *Houston* v. *Keith,* 100 Miss. 83, relied on by counsel, to be the law as to the *"lex fori,"* but I say, these authorities are as wide of the mark in this case as was the shooter in "Georgia Scenes." In other words, the authorities relied on by counsel, claims the right to recover on fraudulent and swindling transactions (if indeed they are, and most of this kind are), because of the rule laid down in *Houston* v. *Keith,* but the court will distinguish the case of simple contracts as in those cases which passes title by possession, and the conveyance of real property, which passes title by deed from the vendor to the vendee, and which have no application to the instant case.

I submit, that if this case was one that *"lex fori"* and innocent purchaser rule had its application, it is barren of it, for the reason, that the appellant well knew from the contract and notes executed between the Montray Realty Company and A. J. Pennington, what they were given for: Knew that the Montray Realty Company were to deliver a proper deed, duly executed and acknowledged by it, and an abstract of title by a Guarantee Company which it never did tender, and hence, the plaintiffs or appellants are bound by the muniments of title from the Montray Realty Company, and not appellee.

I submit, from a casual glance at the case of *Baldwin* v. *Anderson,* decided by this honorable court on January 27, 1913, 60 So. 578, wherein it is held: "When the appellee purchased the land, he knew that the debt to the Mortgage Company had not been paid. He knew, or is

presumed to have known (*Deason* v. *Taylor,* 53 Miss. 697), what the recited consideration in the deed was. This knowledge was sufficient to have excited his attention and put him upon inquiry.

A slight investigation would have conducted him to a knowledge of the true state of the title; consequently, he must be charged with knowledge thereof, for "whatever is enough to excite attention or put a party on inquiry, is notice of everything to which such attention or inquiry might reasonably lead." *Parker* v. *Foy,* 43 Miss. 260, 5 Am. Rep. 484." So here a "slight investigation" of the contract and notes between the Montray Realty Company and Pennington would have prevented this alleged innocent purchaser fraud.

Wherefore I respectfully ask that the case be affirmed.

REED, J., delivered the opinion of the court.

This is an action brought in a justice of the peace court, by appellant, to recover the amount of certain promissory notes made by appellee. When the case was tried in the circuit court, upon appeal, after testimony for both sides had been introduced, the court refused a peremptory instruction in favor of appellant, and granted a peremptory instruction to find for appellee.

The record discloses that on March 8, 1911, appellee made application to the Montray Realty Company to purchase five lots on Long Island, New York. This application was confirmed, and contains the contract of sale. It shows that all payments were to be made to the order of the Montray Realty Company, and when the purchase price was paid in full, according to contract, a full covenant warranty deed was to be issued, free of cost, to appellee. It also stipulates that the lots were to be high and dry and free from all incumbrances, and that the title was guaranteed by the United States Title Guaranty & Indemnity Company of New York.

The purchase price of the lots was sixty-eight dollars and forty cents each, to be paid by check for twenty-eight

dollars and fifty cents, as cash, and the balance in eleven payments, each twenty-eight dollars and fifty cents. The payments were evidenced by the notes of appellee, dated March 8, 1911, and payable to Montray Realty Company, or order, at the office of American Funding Corporation, appellant in Washington, D. C. These notes were payable monthly. They were indorsed in blank by the Montray Realty Company, the payee, and thereby, on March 14, 1911, transferred to appellant for a valuable consideration. The notes were duly negotiated before any one of them fell due. The evidence for appellant shows that it did not receive any notice of any equity or defense to the notes.

It seems to be contended by appellee that he refused to carry out his purchase because the lots were not high and dry, as guaranteed to be. We fail to find, however, any testimony offered by appellee to sustain this contention. On the other hand, there is testimony on the part of appellant that the lots were substantially as described in the contract.

Another contention appears to be that no deed had been tendered by appellant from the Montray Realty Company from whom the lots were purchased. It was not necessary for the appellant, the assignee of the notes for the purchase money, to tender a deed in order to obtain judgment in this case. *Mhoon* v. *Wilkerson,* 47 Miss. 633; *Kimbrough* v. *Curtis,* 50 Miss. 117; *Boyce* v. *Francis,* 56 Miss. 573.

In the trial it became incumbent upon appellee to show that he had equities or defenses to the notes, and that appellant had due notice thereof. He has failed in this. In truth, the proof fails to establish any equities or defenses to the notes, or any fraud or deceit practiced upon appellee in the matter.

The peremptory instruction to find for appellant should have been given.

Reversed, and judgment here for appellant.

Reversed.

SUNFLOWER COUNTY v. HARRY MCCLURG BROS. CO.

[64 South. 846.]

COUNTY WARRANTS. *Payment. Interest.*

Where a claim against a county has been allowed and a warrant issued therefor which has been legally registered, it should be paid in the order of its registration without interest.

APPEAL from the circuit court of Sunflower county.

HON. MONROE MCCLURG, Judge.

Petition for mandamus by Harry McClurg Brothers Company against Sunflower county and others. From an order granting the writ, respondent appeals.

This suit was begun by petition in the circuit court for writ of mandamus to compel the treasurer of the county to pay certain warrants held by the petitioner, Harry Bros. Company, which amount had been allowed by the board of supervisors December 5, 1911, and for which warrants had been issued on said date. The petition also asked for legal interest on said warrants from date of issuance, and prays that the warrants be paid out of the first moneys coming into the treasury; said warrants having been duly registered according to law.

The defendant demurred to the bill, the demurrer was overruled, and, defendant having declined to plead further, there was a judgment for plaintiff, directing the treasurer to pay the warrants held by plaintiff, together with six per cent. interest thereon from date, and directing that said warrants take precedence over all other warrants issued by the county against said funds, except such as had been registered prior to the registration of plaintiff's warrants, unless such warrants as were registered before plaintiff's warrants had not been presented for payment within one year.

Whitfield & Whitfield, attorneys for appellant.

Frank E. Everett, attorney for appellee.

Argued orally by *A. H. Whitfield,* for appellant.

PER CURIAM. We find no error in this record, except the allowance in the judgment below of interest upon the warrant. With this exception, the action of the court below is approved, and judgment will be entered here as entered below, eliminating interest.

Affirmed.

MANN'S MERCANTILE CO. *v.* A. B. SMITH.

[64 South. 929.]

1. CORPORATION. *Liability of directors. Debts exceeding capital stock. Courts. Terms of court. Civil terms. Code* 1906, *section* 924. *Laws* 1910, *chapter* 105.

Under Code 1906, section 924, providing that the amount of debts which a trading corporation may contract shall not exceed the amount of its capital stock paid in, and in case the debts exceed that amount, the directors who contracted such debts shall be individually liable for the excess, the debts prohibited by this statute must be valid claims against the corporation, enforceable in the courts, and capable of being made a charge on the assets of the company.

2. SAME.

In order to make a director liable for such excess it must be shown that the director sought to be charged with liability assents to, or contracted the debt officially as a director, acting concurrently with a majority of the board.

3. COURTS. *Term of courts. Civil terms. Laws* 1910, *chapter* 105.

Under chapter 105, Laws 1910, fixing the terms of court in Sunflower county and providing that the first twelve days of each term shall be for civil business and the last twelve days for

criminal business, where a civil case was tried during the first twelve days, but a motion for a new trial in the case was decided in the last twelve days this was not error, since the division of time was for convenience, and in nowise limits the power of the court to try a case properly within its jurisdiction. A judge cannot however ignore the division of time, when to do so would deprive a party to a lawsuit of any substantial right.

ON SUGGESTION OF ERROR.

CORPORATIONS. *Liability of directors. Debts in excess of capital stock. Code* 1906, *section* 924.

Under section 924, Code 1906, making directors of corporations individually liable for debts of the corporation "contracted" by them in excess of the paid in capital stock of the corporation, in order to hold a director personally responsible, he must have been one of those directors, who concurrently acting as such and constituting a majority, consented to the debt.

APPEAL from the circuit court of Sunflower county.

HON. MONROE MCCLURG, Judge.

Suit by Mann's Mercantile Company against A. B. Smith. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Frank E. Everett, for appellant.

This suit was filed against A. B. Smith, as director of the Smith Mercantile Company, for the purpose of holding him liable, as a director, under section 924, Code of 1906, which is as follows: "The amount of debts which any trading corporation or company may contract or owe shall not exceed the amount of its capital stock paid in; and, in case the debts exceed that amount, the directors who contracted such debts shall be individually liable for the excess over the amount of capital stock, and may be sued therefor by any creditor, whether the debt be due at the time of suit brought or not, if such creditor was without notice or knowledge of the excess at the time his debt was made."

There is no question but that this debt is one that arose by contract between the parties. There is nothing indefinite or uncertain about it. A particular price was to be paid for particular goods, which goods were shipped and delivered beyond any question. The only question in this case is, whether or not a director of a mercantile corporation is liable for a contracted debt, under the above statute.

Some courts hold statutes of this character penal in their nature and therefore should be strictly construed. Among these authorities are: *Chase* v. *Curtis,* 113 U. S. 452, 28 L. Ed. 1038; *Child* v. *Boston, etc., Iron Works,* 137 Mass. 516; *Leighton* v. *Campbell,* 17 R. I. 51.

From a review of these cases it will be seen that the statute construed therein are different from the statute now under consideration.

Admitting for the sake of argument that section 924, is penal in its nature and requires a strict construction by the court, it is my contention under the facts of the case at bar, when applied to the statute, are sufficient to render the defendant liable, under a strict construction of the statute.

In order to make a director liable under a strict construction of the statute, it would only be necessary to prove the paid in capital of the corporation; that its debts exceed that amount; that the defendant was a director at the time the debt was contracted; that the creditor was without notice or knowledge that the debts of the concern exceeded its paid in capital stock.

In this case, we did not only meet the burden of the statute, whether it be penal or not, but we went further and proved by McWilliams, the manager of the Smith Mercantile Company, that Mr. A. B. Smith was present when the shoes were sold, looked over the line of shoes with McWilliams, the manager, and at that time stated to Mr. Sondfield, the traveling salesman of the Manss Shoe Manufacturing Company, that the Smith Mercan-

tile Company was in good condition, that he was satisfied with the line of shoes and never expected to handle any other than its shoes. That certainly makes him a party to the contract between the Smith Mercantile Company and the Manss Shoe Manufacturing Company, and therefore liable to pay the balance of this account.

Other courts, however, hold such statutes not penal, but to be for the protection of creditors, and therefore remedial. Among which are *Morgan* v. *Hedstrom,* 164 N. Y. 224, and *Matty* v. *Sampson,* 71 Supp. 731.

Where there is an existing debt arising by contract and for which the corporation is liable, the directors are liable also. *Gold* v. *Clyne,* 134 N. Y. 262; *Stuffel* v. *Hothurst,* 73 N. Y. Supp. 1034; *Thestle* v. *Jones,* 107 N. Y. Supp. 840; *Trenity Church* v. *Vanderbilt,* 98 N. Y. 170.

And this seems to be the view taken by this court in the case of *Avery* v. *McClure,* 94 Miss. 172, where this particular section of the Code was under discussion. While the question in that case was very different from the one here presented, yet in discussing section 924 of the Code 1906, this court said at page 183 of the opinion, after quoting the above section, "It will thus be seen that the statute speaks of 'debts contracted' and 'debts existing,' and for the payment of these obligations the directors and stockholders are liable." Continuing its discussion of this statute, at page 191 of the opinion, this court said, "These statutes proceed upon the theory that any one extending credit to the corporation has a right to presume conclusively that the stock subscribed has been fully paid in, that the capital stock in an insolvent concern shall not be distributed in dividends, and that the corporation shall not contract debts in excess of its capital stock. As to these matters the directors and stockholders are held liable." Thus it is seen that it is the duty of the directors of a corporation to know its condition and to see that its debts do not exceed the paid in capital stock, and if they do not see to it and allow it to

become involved beyond the capital stock, then they become individually liable.

Therefore, the instruction asked by the plaintiff announced the true principals of law under section 924, and should have been given, and the peremptory instruction asked by the defendant should have been refused.

One other point that I desire to mention briefly; that is, the court was without authority to hear and pass upon the motion to set aside the judgment rendered by the court in the first trial, and to grant a new trial to the defendant.

Section 23 of chapter 104, Acts of 1910, creating the fourth judicial district, by paragraph five, divided the court term into civil and criminal term; the first twelve days for civil business and the last twelve days for criminal business. It will be noted from the judgment of the court that in the first trial of this cause a jury was waived and the case submitted to the decision of the court and he rendered a judgment for the plaintiff. The civil term expired on October 14th and by reference to the record it will be seen that the motion to set aside the judgment was filed on the 16th of October, which was during the criminal term and two days after the civil term had expired. The court certainly could not have tried any civil business during the criminal term. Then if he could not take up and try civil cases in that term, he was certainly without authority to take up this motion, set aside a judgment and render a new trial. In the order sustaining the motion to set aside the judgment and grant a new trial, it will be seen that special exceptions were taken to the action of the court in taking this motion up and passing on it during the criminal term. Had the motion been filed during the civil term and had, by consent of counsel, been continued until some time during the criminal term, then the action of the court would have been proper. But for it to be filed after the civil term had ended and then considered by the court, I think was error.

J. Holmes Baker, for appellee.

Appellant by this suit seeks to hold appellee, A. B. Smith, liable as a director of the Smith Mercantile Company under the provisions of section 924 of the Code of 1906, which reads as follows: "The amount of the debts which any trading corporation or company may contract or owe shall not exceed the amount of its capital stock paid in; and, in case the debts exceed that amount, the directors who contracted such debts shall be individually liable for the excess over the amount of capital stock, and may be sued therefor by any creditor, whether the debt be due at the time of suit brought or not, if such creditor was without notice or knowledge of the excess at the time his debt was made."

The most that can be said to fix liability on A. B. Smith, the appellee, is that he was present and had knowledge of the fact that the manager of the Smith Mercantile Company had an order for the purchase of the goods. Does this make him individually liable under the provisions of section 924 above cited? I think not; this statute is very clearly expressed and admits of no ambiguity. Knowledge that the debt is being contracted for, in excess of the capital stock is not sufficient, and neither is acquiescence or assent sufficient to fix an individual liability on one who is a director of a corporation. This is a highly penal statute, and as such must be strictly construed. The party to be held individually liable must contract the debt, and not only this, he must make this contract as a director, not as an individual, and not as a stockholder. In other words the purpose of this statute is to enable creditors to protect themselves if they see proper so to do, by saying to those corporations asking for credit, "We will grant the credit asked for if you will have your creditors to contract for it as such. We are willing to deal with your corporation in this matter through your directory, but not otherwise." Certainly this is not an unreasonable construction to put on

this statute, nor is it imposing any hardship upon those who are dealing with corporations in the way of furnishing them credit; and it is but fair and just to require those who seek the benefits and protection of a special statute like this one, which is in derogation of the common law, to bring this case clearly within its provisions. Have appellants done this? Clearly they have not. It nowhere appears in the record that A. B. Smith, or anyone else, as a director of the Smith Mercantile Company contracted the debt sued for, or any part thereof. I concede that it is not necessary that those who are directors of a corporation should have a formal director's meeting, with proceedings entered upon the minutes, in order to make their acts as directors valid; but on the other hand I contend that there is quite a difference between the acts of a person acting as a director, and his acts as a stockholder, or as an individual. Certainly it will not be contended that in the absence of a by-law giving special authority, that one director can hold meetings, confer with himself and do anything valid as a board of directors, or do anything which is contemplated should be done by a board of directors.

"The power of directors belongs to them collectively and not individually. The fact that a person is a director gives him no authority to act for the corporation, except when acting as a member of the board, in the absence of a by-law conferring special authority upon him." 21 Am. & Eng. Ency. pages 864 and 865 and cases cited in notes 2 and 3; 57 Am. Rep. 193; 64 Am. St. Rep. 257; 37 Am. Dec. 227; 2 Thompson on Corporations, 1073.

The statutes making officers or directors of corporations liable for the corporate debts in certain cases is regarded by most courts as of a penal nature, the liability under the statutes not being founded upon contract, but arising from misconduct in office. 21 Am. & Eng. Ency., p. 882, and cases cited.

As penal statutes they must not be construed as to cover cases not clearly within their terms. 28 Am. & Eng. Ency., p. 658; 2 Thompson on Corporations, section 1345; 53 Am. Dec. note page 651; 33 Northeastern Reporter, 880; *Merrill* v. *Melchior,* 30 Miss. 516; *Foote* v. *Van Zandt,* 34 Miss. 41.

In several states it is provided that where a corporation contracts indebtedness in excess of its capital stock paid in, or of a certain proportion thereof, the directors assenting thereto shall be individually liable to creditors for such excess. The statutory liability in such cases is limited to debts in excess of the capital stock and arises only where debts are contracted in excess of the capital stock.

Under such a statute a director cannot be held liable unless he has assented to the creation of the excess debt; and it has been held that the assent must have been given to the particular debt sued on. The assent must be given before the indebtedness is created. A director who merely recognizes or fails to dissent from a debt already contracted without his knowledge is not liable. Moreover the assent must be given by a director in his capacity as such, acting concurrently with a majority of the board. 21 Am. & Eng. Ency., pp. 888 and 889, and authorities there cited. See also *Trademan Publishing Company* v. *Knoxville Car Wheel Company,* 49 Am. St. Rep. 957, 958, 959.

I respectfully call the particular attention of the court to this last case cited, as it is a case strongly in point and the questions involved in the case at bar are very ably discussed on the pages referred to above. This case is in every way analagous to the one under consideration. The only difference being that the law which governed that case and the charter of the Knoxville Car Wheel Company, contains the following clause, to wit: "If the indebtedness of the said company shall at any time exceed the capital stock paid in, the directors assenting

thereto shall be individually liable to the creditors for such excess." It will be seen that all that was required under the law governing that case was that the directors assenting to the indebtedness should be individually liable, whereas in the case under consideration the statute is that the directors who contracted such debts shall be individually liable etc. The court in this case said: "It has been uniformally held that such statutes being in derogation of the common law must be strictly construed." As cited by Mr. Cook in his work on Stock and Stockholders, "Although founded on constructions of public policy and general convenience they are not to be extended beyond the plain intent of the words of the statute." Again the court says, quoting from Thompson's Commentaries on Private Corporations, section 4271: "It is a principle of legal procedure that when a party sues to enforce a liability created by statute in derogation of the common law, he must not only distinctly aver, but he must make strict proof of a case within the terms of the statute." Where the liability is imposed upon the directors assenting thereto, the creditor must both allege and prove that the directors against whom he proceeds did assent to the unlawful contract. Citing Thompson on Private Corporations, 4206.

Quoting from the same opinion the court says: "It is insisted by counsel for the directors that the assent contemplated by the statute must be given by the directors not as individuals, nor even as stockholders, but in their capacity as directors. We are constrained to believe upon mature consideration that this construction is the proper one to be given to this statute. This construction accords with the general rule that the directors must act as an official body."

Mr. Cook in his work on Stocks and Stockholders states the rule thus: "The directors can contract and act only as a board duly notified and assembled. The members of the board cannot agree separately and out-

side of the meeting and thereby bind the corporation. Nor can a minority of the body meet and bind the board. A majority must be present and then a majority of that majority binds the corporation. A single director has no power to contract for the corporation."

2 Cook on Stocks and Stockholders, section 712: "So that when it is sought to hold a director to individual liability under the provisions of this highly penal state, it must be shown that his assent was given in his capacity as director acting concurrently with the majority of the official board. We do not hold that the only evidence of this official assent must be found on the minutes of the board, but we do hold that there must have been an official meeting when assent was given whether it appears on the minutes or otherwise."

I respectfully submit that the case of *Avery* v. *McClure et al*, 94 Miss. 172, is not analagous to the one under consideration and the principles involved announced in that case are very different from the ones involved in the case at bar.

Counsel for the appellant make the point that the order of the court setting aside the former judgment rendered in this case and granting defendant a new trial was without authority, because the Act of 1910, providing for the terms of court of the fourth judicial district provides in substance that the first two weeks of the Sunflower court shall be devoted to civil business and the next two weeks for criminal business. The facts are that the case was tried before the court on the last day of the second term. The minutes for that day were not signed until the following Tuesday, October 17th, which was the second day of the term set aside for criminal business. The motion to set aside the judgment and grant a new trial was filed on Monday, October 16, 1911, before the minutes of the previous Saturday had been signed. We mention these facts here simply for the purpose of calling the court's attention to the attitude the minutes were in at

that time, but I do not consider this as at all material, as there can be no question but that the circuit court during its entire term of four weeks had jurisdiction over all civil matters coming before it during the first two weeks of the term, and there is nothing in the law providing for holding a term of two weeks for civil business and two weeks for criminal business, which would justify anyone in assuming that the court shall not have jurisdiction during the entire term over all civil matters and cases which had been before it during the first two weeks; and especially so for the hearing of motions and disposing of them. Section 156 of the Constitution provides as follows: "Circuit courts shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law."

The legislature in 1910 provided that Sunflower county should have two terms of circuit court each year, one beginning in March to be held for four weeks and one beginning in October to be held for four weeks. Whenever this court was convened and organized it had jurisdiction throughout the entire term of four weeks "in all matters civil and criminal" and the legislature could not have taken this constitutional power away from the court even though it had been its purpose to do so.

COOK, J., delivered the opinion of the court.

The Smith Mercantile Company, a trading corporation, under the laws of this state, was doing business at its domicile in Indianola. The manager of the company bought a bill of merchandise from the traveling salesman of appellant. When this purchase was made, appellee, A. B. Smith, was present and assented to the purchase. Mr. Smith was, at this time, one of the directors of the Smith Mercantile Company. The merchandise so purchased was delivered to the Smith Mercantile Company.

Subsequently the Smith Mercantile Company was declared a bankrupt, and its estate was administered

through the bankrupt court. Appellant received dividends in the settlement of the estate, but, after crediting all of said dividends to its aforesaid claim, a balance of two hundred eighty-four dollars and three cents remained unpaid. This suit was instituted against appellee, A. B. Smith, for this balance, on the ground that he, as director of the mercantile company, contracted this debt, which was in excess of the "capital stock paid in," of said corporation; that he, having contracted such debt, is individually liable "for the excess over the amount of capital stock," by virtue of the provisions of section 924, Code of 1906, reading as follows: "The amount of debts which any trading corporation or company may contract or owe shall not exceed the amount of its capital stock paid in; and, in case the debts exceed that amount, the directors who contracted such debts shall be individually liable for the excess over the amount of capital stock, and may be sued therefor by any creditor, whether the debt be due at the time of suit brought or not, if such creditor was without notice or knowledge of the excess at the time his debt was made." Whether statutes of this character are penal statutes, in the sense that they must be strictly construed by the courts, has been the subject of some diversity of opinion, but it would seem that the great weight of authority regards such statutes as penal in their nature. The liability imposed by the statute is of purely statutory origin, and we must look to the statute itself to ascertain whether or not the facts of each particular case bring the defendant within the terms of the law.

Mr. Smith was a director of the mercantile company, and was present when the debt was contracted, and inferentially, at least, assented to the contract of purchase. For present purposes it is conceded that the company was then insolvent, and the debt then made was in excess of the capital stock of the debtor company.

The first clause of section 924 of the Code, the section under consideration, limits the indebtedness trading

corporations may lawfully contract, and, to enforce this policy of the law, the second clause of the section gives to any creditor of the corporation the right to sue all directors of the corporation individually "who contracted such debts."

It must be admitted that Mr. Smith could not make a contract binding on the corporation merely because he happened to be a director. It seems clear also that debts prohibited by the statute must be valid claims against the corporation, enforceable in the courts, and capable of being made a charge on the assets of the company. The manager of the company had authority to buy and sell, but there is nothing in the record to suggest that individual directors possessed the same power.

Again, directors act together, and usually express their acts in the minutes of the board; but, whether so expressed or not, it must be shown that the director sought to be charged with liability assented to, or contracted, the debt officially as a director, acting concurrently with a majority of the board. *Tradesman Pub. Co.* v. *Knoxville Car Company,* 95 Tenn. 634, 32 S. W. 1097, 31 L. R. A. 593, 49 Am. St. Rep. 943. This case is the only case brought to our notice deciding the exact point involved in this case, and the rule therein announced meets with the approval of the text-writers. So far as we have been able to ascertain, the soundness of the decision has not been questioned. See *Shackelford* v. *R. R. Co.,* 37 Miss. 202. It may be, and is, suggested that this rule will make it extremely difficult to fix liability upon directors of trading corporations. It is not the function of the courts to supplement legislation, or to give a construction to statutes not warranted by the terms thereof. Appeal to the lawmakers, and not to the courts, is the only remedy, if the statutes have not gone far enough to remedy existing evils.

Chapter 104, Acts of 1910, fixing the terms of court in Sunflower county, provides that the first twelve days of

each term shall be for civil business, and the last twelve days for criminal business. Judgment in this case was rendered during the first twelve days of the term, but the motion for a new trial was not disposed of until after the expiration of what is termed by the briefs civil term. The order overruling the motion was, however, entered on the minutes of the last twelve days. It is contended that the court could not transact any civil business after the first twelve days. The division of the time was for convenience, and in nowise limits the power of the court to try a case properly within its jurisdiction. The judge cannot ignore the division of time, when to do so would deprive a party to a law suit of any substantial right.

Affirmed.

ON SUGGESTION OF ERROR.

It is suggested that, to maintain the original opinion in this cause, it will be necessary to overrule two former decisions of this court, viz., *Avery & Sons* v. *McClure*, 94 Miss. 172, 47 So. 901, 22 L. R. A. (N. S.) 256, 19 Ann. Cas. 134, and *Kimbrough* v. *Davies*, 61 So. 697. When the original opinion was written, it was not conceived that the cases cited were applicable to the present case, and upon a re-examination of same no reason appears why this conception should be revised.

The present case is based on section 924, Code 1906, making directors of corporations individually liable for debts of the corporation contracted by them in excess of the paid-in capital stock of the corporation. *Avery & Sons* v. *McClure, supra,* was an action in the chancery court of Lowndes county, based upon a decree of the circuit court of the United States awarding Avery & Sons a judgment for damages against a corporation for the infringement of a patent right owned by Avery & Sons. This bill sought to hold the stockholders and directors of the corporation liable for the amount of this decree, "the contention being that the stockholders were

liable under section 909 of the Code of 1906 for the amount of any balance that may remain unpaid for the stock subscribed for by them; further, that under section 923 of the Code the directors and stockholders were liable for the amount of the capital stock withdrawn and dividends declared while the company was insolvent; further, that the directors were liable under section 924 of the Code for debts contracted in excess of the capital stock." It will be seen that the last-named cause of action is based on section 924 of the Code, and that the cause of action in the present case is based on the same section.

In *Avery & Sons* v. *McClure,* the court held that the directors were not liable, for the reason that damages awarded for the infringement of a patent did not fall within the meaning of our statutes making stockholders and directors liable under certain circumstances for the debts of corporations. This was the "single question" presented to the court, and nothing more was decided. It was held that the cause of action sued on was not a debt in the sense of the statutes. The question here presented and decided was not then before the court.

In *Kimbrough* v. *Davies,* 61 So. 697, this court merely held that a stockholder of a corporation cannot withdraw the capital stock of the company until all of the debts then owing by the corporation have been paid. This was the question before the court, and this is all the court passed on. The "single question" presented by the record of the present case is: Did the director contract the debt? This question was answered in the negative, and in doing so it was not necessary to overrule, criticise, or explain *Avery* v. *McClure* or *Kimbrough* v. *Davies,* because it seemed obvious that these cases do not in anywise conflict with the conclusion reached in the present case.

Suggestion of error overruled.

J. J. NEWMAN LUMBER CO. v. ADOLPH DANTZLER.

[64 South. 931.]

1. MASTER AND SERVANT. *Action. Separate causes of action. Declaration. Injury to servant. Negligence of employee. Appeal and error. Harmless error. Admission of evidence. Assumption of risks. Trial. Misleading instructions. Application to evidence.*

In an action by a servant against the master for personal injury where the gist of the first count in the declaration is that defendant was negligent in its failure to properly instruct and warn plaintiff of the dangers incident to the operation of the machine he was employed to operate, the fact that this count further describes in circumstantial detail the machinery, its location, character and the manner in which the same was operated, does not make the count duplicitous.

2. SAME.

Where the gist of the second count in such declaration is that during the operation of the machinery a dangerous defect developed in the machinery, and this was known to defendant, and it was then the duty of the master to repair the same, and failing to do so, the master was negligent and responsible for all damages resulting from the neglect of its duty to plaintiff, the fact that this count further reiterates a description of the machinery and the method of its operation, which other averments were intended to negative the idea that plaintiff, after he knew of the danger, assumed the risk of continuing the work, does not make such count duplicitous.

3. MASTER AND SERVANT. *Injury to servant. Negligence of employee.*

Where it was the duty of the coemployee to instruct another employee and to keep the machinery in proper condition, and his attention was directed to the defect which caused the injury, his failure to repair the defect was the negligence of the master.

4. APPEAL AND ERROR. *Admission of evidence. Harmless.*

In a suit for personal injury by a minor, it was error to admit evidence that he was employed by defendant without the consent of his father, there being no averment in the declaration to support such testimony, but for this error alone the court on appeal would not reverse the case.

5. MASTER AND SERVANT. *Injury to servant. Assumption of risks.*
In a suit for personal injury caused by defective machinery, where it was the duty of plaintiff, when anything wrong in the machinery developed, to notify another employee who was employed by the master to make needed repairs, and plaintiff attempted to pull a raveled strip off the belt operating the machinery, without disconnecting the machinery, and was injured thereby, it was a voluntarily assumed risk which was obvious, and in such case he cannot recover.

6. TRIAL. *Misleading instructions. Application to evidence.*
In a suit for personal injury by a servant against the master it was error to grant an instruction for the plaintiff "that if the jury believe from the evidence that the defendant is guilty of the acts of negligence complained of in the declaration they will find for the plaintiff," where there were two counts in the declaration and there was no evidence to support the first count.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Suit by Adolph Dantzler against the J. J. Newman Lumber Company. From a judgment for plaintiff, defendant appeals.

Appellee, a negro boy about sixteen or seventeen years of age, was plaintiff in the court below, and appellant was defendant. There was a judgment for plaintiff for three thousand dollars for injuries received, which resulted in the amputation of plaintiff's leg above the knee, from which an appeal is taken. The opinion states the facts.

The fifth, sixth, and seventh assignments of error are as follows:

"Fifth. The court erred in admitting in evidence over the objection and exception of the appellant, as appears in the record at pages 123 and 124 in the cross-examination of W. J. Haynen, a witness for appellant, statements of the witness in answer to hypothetical questions propounded by counsel for appellees to the effect that, if Teel did not carry out witness' instructions as to the employment of minors, he violated instructions; such testi-

mony being wholly irrelevant to the issue, incompetent, and calculated to prejudice the minds of the jury.

"Sixth. The court erred in overruling appellant's motion to exclude all the testimony and to instruct the jury to find for it, made after appellee rested, as appears at page 108 of the record; it appearing from the testimony as stated and specified in said motion that the proof wholly failed to support any ground of liability set forth in the declaration, and the appellee not asking the court for permission to amend the declaration, so as to support it, if possible by the proof.

"Seventh. The court erred in overruling appellant's motion, made at the conclusion of the testimony, as appears in the record at page 196, to exclude all the evidence for reasons stated in said motion, and to grant it a peremptory instruction."

The ninth instruction, asked by the defendant below and refused by the court, is as follows:

"No. 9. The court further instructs the jury, for the defendant, that if they believe from the evidence that the plaintiff was injured while attempting to pull a raveled piece or strip from the belt in question, then his own negligence caused the injury, and they should find for the defendant."

The first instruction, given for plaintiff below, is as follows:

"No. 1. The court instructs the jury, for the plaintiff, that if they believe from the evidence that the defendant is guilty of the acts of negligence complained of in the declaration, and that the injury to plaintiff resulted therefrom while he was in the exercise of such reasonable care and caution for his own safety as would be expected of a reasonable person of his age and experience similarly situated, then they must find a verdict for the plaintiff, and assess his damages at such sum as they believe from the evidence he is entitled to receive, not exceeding the amount sued for."

S. E. Travis, attorney for appellant.

D. E. Sullivan and *Currie & Currie,* attorneys for appellee.

Argued orally by *S. E. Travis,* for appellant, and *D. T. Currie* and *D. E. Sullivan,* for appellee.

COOK, J., delivered the opinion of the court.

This action was begun in the circuit court of Forest county by appellee, a minor, against appellant, a corporation, engaged in the business of operating a sawmill and planing mill. Appellee was in the employ of appellant, and while operating a planing machine he was injured, because, as he alleges, one of the belts on the machine he was feeding became defective and dangerous, and appellant, having notice of this defect, failed and refused to repair same. The case was submitted to the jury, and a verdict was rendered in favor of appellee, plaintiff below, for three thousand dollars, and appellant, defendant below, appeals to this court.

Defendant below demurred to the declaration, which demurrer was overruled, and this action of the court is the first assignment of error we will notice. The demurrer to the first count of the declaration avers that this count contains two separate and distinct causes of action, to wit: It was the duty of defendant to furnish plaintiff a safe place in which to work, and to warn and instruct plaintiff as to the dangers incident to his work; that the declaration avers appellant violated its duties to appellee in each of said regards. The second count of the declaration was demurred to upon the ground that it also stated several separate and distinct causes of action.

The first count of the declaration describes in circumstantial detail the machinery, its location, character, and the manner in which the same was operated, and a casual reading of same would suggest the idea that several

and distinct causes of action are set out thereby. We think, however, a proper analysis of this count discloses one cause of action, and that therefore the same is not duplicitous. This count, to our mind, charges that appellant was negligent in its failure to properly instruct and warn appellee of the dangers incident to the operation of the machine he was employed to operate.

The second count of the declaration, as we read it, merely reiterates a description of the machinery and the method of its operation, and then avers that, during the operation of the machine appellee was employed to run, one of the belts controlling the machine developed a defect which rendered further operation of same exceedingly dangerous; that appellee stopped the machine and called the attention of appellant's servant, designated by the master to keep the machine in a safe condition, to the defect; that this foreman, or helper, refused to repair the belt and informed him that there was no danger, and ordered him to go on with his work; and that appellee, relying on the superior judgment of this man, did continue to run the machine, and while so doing he received the injury complained of. The gist of this count is that during the operation of the machinery a dangerous defect in the machinery developed, and this was known to appellant, and it was then the duty of the master to repair same, and, failing to do so, the master was negligent, and responsible for all damages resulting from the neglect of its duty to appellee. The other averments were intended to negative the idea that appellee, after he knew of the danger, assumed the risk of continuing the work. There was no error in overruling the demurrer to the declaration.

The next contention of appellant is that the evidence, at most, shows that appellee was injured by the negligence of a fellow servant. It is earnestly contended that Mr. Youngblood, who is designated as a "helper," was a fellow servant of appellee, and that appellant is not re-

sponsible for his negligence. It was the duty of this man to instruct appellee and to keep the machinery in proper condition, and his attention was directed to the defect which the evidence shows was the cause of the injury, and his failure to repair this defect was the negligence of the master. *Finkbine Lumber Co.* v. *Cunningham,* 101 Miss. 292, 57 So. 916; *Railway Co.* v. *Groome,* 97 Miss. 206, 52 So. 703.

Again, it is said that it was error to admit evidence to the effect that appellee was employed by appellant without the consent of his father, there being no averment in the declaration to support such testimony. We think this evidence should have been excluded; but for this error alone this court would not be justified in reversing the case.

The fifth assignment of error is also well taken.

The sixth and seventh assignments of error are predicated on the theory that it was the duty of the trial court to have peremptorily instructed the jury to return a verdict for defendant. We are of opinion that the court properly refused to grant the peremptory instruction.

We hold that the court erred in refusing the ninth instruction asked by appellant. If appellee attempted to pull a raveled strip off the belt, as one of appellant's witnesses testified, without disconnecting the machinery, he assumed a risk which was obvious, and in addition it was no part of his duty to repair the machinery; but, on the contrary, all the evidence demonstrates that he assumed a hazard voluntarily. It was his duty to operate the planer, and, when anything wrong in the machinery developed, it was the duty of appellee to notify Mr. Youngblood, who was employed by the master to make the needed repairs.

The first instruction granted for plaintiff below is misleading, and should not have been given. It admonishes the jury to find for plaintiff "if they believe from the evidence that the defendant is guilty of the acts of negli-

gence complained of in the declaration." There is no evidence to support the first count of the declaration; all the evidence shows plaintiff was properly instructed and warned. It is also clear from plaintiff's own testimony that he was experienced, or at least, that he so informed his employer.

Reversed and remanded.

POSTAL TELEGRAPH CO. *v.* J. L. CRISCOE.

[64 South. 933.]

TELEGRAPHS AND TELEPHONES. *Delay in delivering. Damages.*

A failure to deliver a telegram which if delivered would not have constituted a contract, will not entitle the sendee to damages for failing to make such contract.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by J. L. Criscoe against the Postal Telegraph Company. From a judgment for plaintiff, defendant appeals.

Appellee was endeavoring to secure families of laborers for A. E. Jennings and E. J. Marley, for tenants on their plantations. Jennings and Marley had agreed to pay appellee twenty-five dollars for each family of laborers secured. The agreement was made first by personal interview, and thereafter appellee went to Vicksburg for the purpose of getting the families. On May 5, 1912, he telegraphed Marley from Vicksburg, Mississippi, to Sumner, Mississippi, via Postal Telegraph, as follows: "I can give you as many as six first-class families. If you need all or part, wire me at once. Other parties will take them. I give you preference. No singles or hoboes. Send message *via* Postal. If you tele-

phone, call Cumberland office, at eight fifty a. m." There was a notation on the face of the message: "Care of Mrs. Neal, China street. Will call." Mr. Marley sent the following reply, *via* Postal Telegraph Company, from Sumner, Mississippi, addressed to appellee at Vicksburg, Mississippi, which was received at Vicksburg at ten thirty-seven a. m., May 6, 1912: "Call me over phone. Can use four families."

On May 5, 1912, appellee sent a telegram to Mr. Jennings, from Vicksburg, Mississippi, to Greenwood, Mississippi, *via* Postal Telegraph Company, as follows: "I failed to see your brother Jackson. If you want the five families, place transportation here *via* A. V. for forty-party ticket. You pay for farming families only. No hoboes will appear. You pay no money except transportation until you get them. Wire me, *via Postal*, at once." Notation at the bottom: "Will call for answer." In response to this telegram, Mr. Jennings wired appellee at Vicksburg, the message being received ten twenty-four a. m., May 6, 1912, as follows: "Griffith president bank pay ticket six families, Pay you twenty-five dollars family on delivery."

On the trial appellee testified that he called four times during the day on May 6th, and was informed each time that no telegrams had come for him. The messages were not delivered until about six p. m. May 7th, when a messenger boy located appellee in a hotel. In the meantime, however, the families had become dissatisfied, and had gone with another labor agent. Appellee bases his suit upon the failure of appellant to deliver these answers, claiming that his messages and the replies thereto constituted a contract between him and Messrs. Marley and Jennings, and because of the negligence of the telegraph company he has been damaged to the extent of twenty-five dollars per family for each family which he would have delivered, had the messages been received in time, and asks also punitive damages. The contention of the

telegraph company is that there is no completed contract between appellee and Messrs. Marley and Jennings, and requested a peremptory instruction, which was refused.

The case went to a jury, and verdict was returned for plaintiff for two hundred dollars, from which the telegraph company appeals.

Flowers, Alexander & Brown, for appellant.

It was error to allow the jury to assess damages against the defendant on account of the alleged failure to contract with Jennings and Marley for the reason that the contract was incomplete and there was no way by which it could be shown that if the messages had actually been delivered the contract would have been completed. Something else had to be done after the receipt of these messages before the deal could be closed, and it is but a matter of conjecture as to whether this would or would not have been done. And before compensatory damages can be awarded there must be actual loss, and the court must be able to see that such loss comes directly from the wrongful act of the defendant. *Johnson* v. *Western Union Tel. Co.,* 79 Miss. 58; *Western Union Tel. Co.* v. *Adams Machine Co.,* 92 Miss. 49; *Western Union Tel. Co.* v. *Webb & Smith,* 48 So. (Miss.) 408; *Western Union Tel. Co.* v. *Patty Dry Goods Co.,* 96 Miss. 781; *Beatty Lumber Co.* v. *Western Union Tel. Co.,* 44 S. E. (W. Va.) 308; *Smith* v. *Western Union Tel. Co.,* 83 Ky. 104; *Harmon* v. *Western Union Tel. Co.,* 43 S. E. 959; *Bennett* v. *Western Union Tel. Co.,* 106 N. W. (Ia.) 13; *Richmond Hosiery Mills* v. *Telegraph Co.,* 123 Ga. 216; *Bass* v. *Postal Tel. Co.,* 127 Ga. 423; *Postal Tel. Co.* v. *Louisville Cott. Oil Co.,* 140 Ky. 506; *Fisher* v. *Western Union Tel. Co.,* 119 Wis. 146; *Cherokee Tanning Extract Co.* v. *West. Union Tel. Co.,* 143 N. C. 376.

J. W. Cassedy and *George Butler,* for appellee.

The testimony in this case shows beyond all doubt, and the jury has settled the question, that there was a con-

tract between Criscoe and Jennings and Marley, whereby Criscoe was to procure these laborers and to be paid therefor at the rate of twenty-five dollars per family.

Criscoe testifies unequivocally that there was such a contract with both Jennings and Marley and his statements relating thereto has been fully set out. He says the agreement was that he was to go to Vicksburg and see the number of families that he could get together and they were to pay him twenty-five dollars per family for the number they desired. Not only is this true, but the telegram to Marley shows on its face that there was such a contract because it says: "I can give you as many as six first-class families."

And the telegram to Jennings says: "If you want the five families place transportation here *via* A. & V. for forty party ticket." How it can be logically argued in the face of Criscoe's testimony and in the face of the night lettergrams to Jennings and Marley that there was no contract between these parties we are unable to see.

Criscoe did not know perhaps the number or the character of the families that he could get together until he arrived at Vicksburg, but there was a definite and fixed agreement that he was to receive twenty-five dollars for each family that he could get together that Marley and Jennings accepted. He did get together ten families acceptable to Jennings and Marley and they did agree to accept ten families.

Counsel for appellant in their brief leave out of view all negotiations between Criscoe and Jennings and Marley prior to the time of the sending of the night lettergrams and for this reason alone the contention that there was no complete contract is falacious.

In determining whether or not there was a contract between the parties it was necessary not only to look to the telegrams exchanged between them but to the prior negotiations and to the telegrams. It is undisputably shown that there was a contract between Criscoe and

Jennings and Marley for the number of families to be procured by Criscoe at Vicksburg. Consequently we seriously insist that there was a contract between these parties and the principles contended for by counsel in their brief have no application to the case at bar.

If the telegrams are considered without reference to any previous negotiations it is possibly true that a completed contract is not shown, but the telegrams on their face import that there had been previous negotiations, because in neither telegram from Criscoe is there anything said of the price to be paid and in the one to Marley there is nothing said about the transportation charges. In other words, it is too clear for argument that the telegrams taken in connection with the prior negotiations completed the contract and it is not necessary to further discuss this question.

SMITH, C. J., delivered the opinion of the court.

Had the telegrams from Marley and Jennings been delivered to appellee, no contracts would have been thereby completed. Consequently the case falls within the rule announced in *Johnson* v. *Telegraph Co.*, 79 Miss. 58, 29 So. 787, 89 Am. St. Rep. 584, and applied in *Telegraph Co.* v. *Adams Machine Co.*, 92 Miss. 849, 47 So. 412, *Telegraph Co.* v. *Patty Dry Goods Co.*, 96 Miss. 781, 51 So. 913, and *Telegraph Co.* v. *Crook & Company*, 63 So. 350. The court, therefore, erred in refusing defendant's instructions numbers 4 and 5.

Reversad and remanded.

COOK, J. (dissenting).

Appellee, plaintiff below, made an arrangement with Mr. Marley, of Sumner, and Mr. Jennings, of Greenwood, both planters in the Delta, to go to Vicksburg and there endeavor to secure laborers for these planters. I agree with my associates that the Marley transaction may be eliminated, for the reasons stated in the opinion.

I believe, however, that the telegram to Jennings and Jennings' answer thereto constitute a completed contract, and the failure of the telegraph company to deliver Jennings' reply made it liable in damages to Criscoe. Mr. Criscoe made an agreement with Mr. Jennings to go to Vicksburg and see what he could do, and then notify Jennings. After arriving at Vicksburg, Mr. Criscoe wired Mr. Jennings as follows: "Vicksburg, Miss., 4—5—12. Epsie Jennings, Greenwood, Miss. I failed to see your brother Jackson. If you want the five families place transportation here *via* A. V. for forty party ticket. You pay for farming families only. No hoboes will appear. You pay no money except transportation until you get them. Wire me, *via* Postal, at once. J. L. Criscoe." Mr. Jennings replied promptly as follows: "Greenwood, Miss., May 6, q. J. L. Criscoe, Vicksburg, Miss. Griffith president bank pay tickets six families. Pay you twenty-five family on delivery. A. E. Jennings." This reply was not delivered at all.

It will be observed that Mr. Criscoe's telegram offered five families, and Mr. Jennings' reply informed Mr. Criscoe that the president of the bank would furnish money to pay the transportation for six families, and that Jennings would pay Criscoe twenty-five dollars for each family delivered to him. I interpret this telegram to mean that Jennings accepted the proposition to take the five families Criscoe had wired him about, and it also means, inferentially, that Jennings would take and pay for one more family, if Criscoe saw fit and was able to deliver the extra family. I do not think the two telegrams can be construed to mean that Criscoe made one proposition and Jennings accepted a different proposition. I take it that any business man would have acted on the telegram by forwarding the five families offered, and also the additional family, if he was able to deliver the additonal family.

INGRAM DAY LUMBER CO. *v.* LOUIS JOH.

[64 South. 934.]

1. MASTER AND SERVANT. *Fellow servant. Incompetency. Notice of incompetency. Injuries. Negligence of fellow servant.*

In a suit by a servant against the master for injuries alleged to have been caused by the negligence of an incompetent fellow servant, it is necessary for plaintiff to show, (a) that his fellow servant was incompetent; (b) that the master knew, or should have known, that he was incompetent; (c) that the master failed to discharge the incompetent servant; and (d) that plaintiff was injured because of the negligence of this servant.

2. SAME.

Incompetency denotes the converse of reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment.

3. SAME.

Where the notice of incompetency given to the master by the plaintiff was only that the fellow servant was not a first-class striker, and for this reason plaintiff could not turn out his share of the work, there was nothing in this to show that the fellow servant was a man whom the master might reasonably anticipate would injure the workmen whom he was helping.

4. SAME.

The fact that a blacksmith's helper, or striker, in cutting bolts, struck a glancing or "nudging" blow which caused the hammer to slip off the object struck and injure plaintiff, did not constitute negligence in the discharge of his duties as such an accident may occur with the most skilled and prudent workman.

APPEAL from the circuit court of Harrison county.

HON. J. H. NEVILL, Judge.

Suit by Louis Joh against the Ingram Day Lumber Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Wells, May & Sanders, attorneys for appellant.

Mize & Mize, attorneys for appellee.

The record in this case is lost.

COOK, J., delivered the opinion of the court.

The right of recovery in this case depends mainly upon the proposition that appellee was injured by the negligence of an incompetent fellow servant, and that the master retained in its service the incompetent servant after notice of his incompetency. To maintain this contention it was necessary for appellee, plaintiff below, to show (a) that his fellow servant was incompetent; (b) that the master knew, or should have known, that he was incompetent; (c) that the master failed to discharge the incompetent servant; (d) that appellant was injured because of the negligence of this servant.

Appellee was a blacksmith, and one Sam Gibson was his helper, or striker. It appears that appellee, about two months before the injury, complained to Mr. Cleghorn, who, it seems, was authorized to discharge Sam. He was asked to state what he said to Mr. Cleghorn, and his reply was: "I only told him that Sam was no helper, and that if he wanted the work done he would have to give me a man; I could not work and strike, too." "How many times did you complain about him?" "Constantly; I can't say how many times; numerous times." "You say that about two months before this injury occurred you complained to Mr. Cleghorn about him?" "Yes; from the time Sam started to help me I said that Sam was not worth a continental."

We gather from the entire record that Sam was a man of more than average physical strength, not quick-witted, but a little dull of understanding. There is nothing to show that he was careless or reckless. No effort was made to prove that he had a bad reputation, which would lead to the inference that he was a menace to those work-

ing with him. Appellee was doing the ordinary work of a blacksmith—cutting bolts—and Sam was wielding the sledge. It seems that, instead of striking straight down, Sam struck a glancing or "nudging" blow, which caused the sledge to slip off the object struck and come in contact with a very important part of appellee's anatomy, inflicting serious and painful injury.

We do not think that the evidence warranted the belief that Sam was incompetent, in the sense that he was a dangerous man to those who had to work with him. "Incompetency denotes the converse of reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment." Sam had been in the service of this company for some time, and, with the exception of the accident here in question, no evidence was offered to show that he was not a reasonably safe person to work with.

The notice of incompetency given to the master of appellee was only that Sam was not a first-class striker, and for this reason appellee could not turn out his share of the work. There was nothing in this to show that Sam was a man who the master might reasonably anticipate would injure the workmen whom he was helping.

Besides, we are convinced that the accident causing the injury to appellee was one of the sort that no amount of forethought or skill could eliminate. There is always some risk which a servant must assume, and it seems to us that what occurred in this case does not authorize the finding that Sam was negligent in the discharge of his duties. There was an accident, such as may occur by the act of the most skillful and prudent workman.

Reversed and remanded.

EVA LYNCHARD v. YAZOO & M. V. R. Co.

[64 South. 935.]

1. CARRIERS. *Carrying passengers beyond station. Nominal damages. Punitive damages.*

In a suit by a passenger against a railroad company for being carried beyond her station, where had she not been carried beyond her station, she would have reached her destination by either riding or walking one mile, accompanied by her brother, who would have carried her suit case; but by reason of being carried beyond, she was compelled to walk alone, in order to reach her destination two or two and one-half miles, carrying her suit case herself and by reason thereof was made sick and remained in bed for three or four days with fever, she was entitled to recover more than nominal damages.

2. CARRIERS. *Carrying passengers beyond station. Punitive damages.*

Where plaintiff's cause of action is predicated solely upon the negligence of a railroad company in carrying her beyond her station, and not upon any insult offered her by the conductor and the evidence shows that the failure to stop at her station was not the result of willful or wanton negligence, punitive damages should not be awarded.

APPEAL from the circuit court of Sunflower county.

HON. MONROE MCCLURG, Judge.

Suit by Eva Lynchard against the Yazoo and Mississippi Valley Railroad. From a judgment for plaintiff, defendant appeals.

Appellant purchased a ticket from Morehead to Inwood, a flag station on the line of the appellee, a distance of four or five miles. She boarded the northbound train and took a seat in the rear coach. Before the conductor reached her for the purpose of collecting tickets, the train had passed Inwood, and when she handed her ticket to the conductor she called his attention to that fact. The train stopped at the next station, called Sunflower, and the appellant got off the train. Appellant

lived about a mile north of Inwood and about two and one-half miles south of Sunflower. She had notified her brother to meet her on the northbound train at Inwood. No one met her at Sunflower, and she was without funds to pay a hotel bill, or to hire a team to drive her to her home. She had with her a grip weighing about twenty or twenty-five pounds. She testified that it took her about three hours to walk back from Sunflower to her home lugging this grip, and that as a consequence she reached home very much exhautsed and was confined to her bed for several days with fever. On the trial, the court instructed the jury to find for plaintiff and award nominal damages only. From a judgment for one dollar she appeals.

Walter S. Chapman, for appellant.

The first assignment of error in the above styled cause is to the action of the court below in giving the instruction to the jury at the instance of the defendant there, appellee here, to find for the plaintiff and assess her merely nominal damages.

The instruction excludes actual damages, although it was shown that nothing in palliation was in evidence in the court below in regard to the action of the defendant there, appellee here, in not stopping at appellant's point of destination, and no reason was assigned for such delinquency then or at any subsequent time.

In one of the latest decisions the fact is emphasized by this court in the opinion, and also in the opinion overruling a suggestion of error, that in such case where a passenger is carried beyond his or her place of destination, he or she can always recover actual damages, and to quote the language employed by the then chief justice of the supreme court will be sufficient, we contend, to establish reversible error committed by the court below. In the case of *Y. & M. V. R. R. Co.* v. *Hardie,* 100 Miss. 136, we quote as follows: "It is evident the company

is liable for whatever actual damage Mrs. Hardie may have sustained by the reason of the failure to perform its duty." *Higgins* v. *L. N. O. & T. R. R. Co.*, 64 Miss. 80-82; also, *L. N. O. & T. R. R. Co.* v. *Mask*, 64 Miss. 738-745, inclusive.. *Railroad Co.* v. *Hines*, 69 Miss. 160 to 168.

The second assignment of error is to the action of the court below in refusing to give the plaintiff in the court below instructions number 1, 2, 3, 4 and 5, respectively.

If the plaintiff in the court below, appellant here, was entitled to have the jury consider the question of actual damages, it follows logically that the one instruction given at the request of the defendant to the jury, "to find only nominal damages for the plaintiff," was error, and *ipso facto,* the instructions numbered 5, 1, 2, and 3 refused by the court below, should have been given as each one refers to the recovery of actual damages; therefore a reversible error on the part of the court below is a natural sequence.

We think the court erred in refusing to give for the consideration of the jury punitory damages asked for in instruction number 4. Added to the injury caused by the negligence of the defendant was the insult sustained by the appellant through the conduct and bearing of the conductor or auditor in the presence of the appellant and in the presence of Mr. C. H. Aldridge and others in the car in which appellant was seated. He deliberately refused to satisfy her and allay her anxiety by speech or conduct. She was as completely ignored and scorned as if she were a "dead beat" on the train of appellee, and entitled to no respect or consideration on the part of any of the agents, servants or employees of said train.

The third assignment of error is to the action of the court below in modifying plaintiff's sixth instruction, so as to direct the jury to find nominal damages only, by their verdict. If the jury had the right to consider

whether she was entitled to actual damages, this instruction as modified by the court was wrong and hurtful to the interests of plaintiff, and is error sufficient to cause a reversal of this case.

Mayes & Mayes, for appellee.

The plaintiff has not shown that the conductor was guilty of any malice, wilfulness, wantonness or rudeness, or of anything else which would justify an award of punitive damages.

Not only are the elements of malice, wilfulness, wantonness and rudeness and gross negligence wholly lacking in this case, but even if they were present, that would avail appellant nothing here, because there never can be an award of punitive damages when the plaintiff has shown a right to recover only nominal damages. 23 So. 937; 50 Wis. 645; 86 Tex. 675; 68 Me. 279.

The one and only question in this case is, did the appellant sustain any actual damage by reason of her being carried past Inwood? If she did, then this case must be reversed. But if she did not, then it must be affirmed.

We have gone over the case carefully, and have examined every phase of it, and we are now confident that the action of the court below in limiting plaintiff's recovery to nominal damages was correct.

The trial court heard the witnesses testify, and observed their demeanor while they were on the stand. The trial court was in a far better position to weigh the testimony in this case, than is this supreme court.

After having carefully weighed the testimony, the trial court instructed the jury to award only nominal damages; and we are sure that this supreme court will not take it upon itself to disturb the finding of the lower court. This case should be affirmed.

Argued orally by *W. S. Chapman,* for appellant, and *Lucius L. Mayes,* for appellee.

SMITH, C. J., delivered the opinion of the court.

At the request of the defendant the court below charged the jury "to find for the plaintiff and assess her merely nominal damages," and from a verdict and judgment accordingly plaintiff appeals.

According to the evidence of appellant, had she not been carried by her station, she would have reached her destination by either walking or riding one mile, accompanied by her brother, who would have carried her suit case; but by reason of having been carried by her station she was compelled to walk alone, in order to reach her destination, two or two and one-half miles, carrying her suit case herself, by reason of which she became sick and remained in bed with fever three or four days. If this is true, the jury would have been warranted in awarding her more than mere nominal damages.

The cause of action stated in the declaration is predicated solely upon the negligence of appellee in carrying appellant beyond her station, and not upon any insult offered her by the conductor; and as the evidence shows that the failure of appellee's servants to stop its train at appellant's station was not the result of willful or wanton negligence, punitive damages are not recoverable.

The judgment of the court below will be reversed, in so far as it fixes the amount of appellant's damages, and a new trial awarded on that issue; but in all other respects it will remain in full force and effect.

Reversed.

A. H. AKROYD v. STATE.

[64 South. 936.]

1. LARCENY. *Acts constituting. Obtaining possession of property fraudulently with felonious intent. Criminal law. Instructions. Request. Necessity for. Witnesses. Cross-examination of accused. Extent. Appeal. Record.*

If the possession of personal property is obtained fraudulently, with the felonious intent existing at the time to deprive the owner thereof, and the person so obtaining it does, in pursuance of such intent, deprive the owner of the property, larceny is thereby committed.

2. CRIMINAL LAW. *Instructions. Request. Necessity.*

The court is not required to give an instruction on an issue arising in the case unless requested so to do.

3. LARCENY. *Evidence. Instructions.*

An instruction defining larceny, was unobjectionable, where the issue was whether accused lawfully obtained possession of the property and then converted it to his own use, and hence was not guilty of larceny, or whether he obtained possession fraudulently, with the felonious intent at the time to deprive the owner thereof, followed by conversion, which would make him guilty of larceny.

4. WITNESSES. *Cross-examination of accused. Extent.*

The state has the right to cross-examine a defendant about matters testified to by him in his examination in chief.

5. APPEAL. *Record.*

Where the record on appeal does not disclose that the circuit judge made statements to the jury attributed to him in the assignment of errors the supreme court will not consider such assignment.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

A. H. Akroyd was convicted of larceny and appeals.

Appellant assigns among other errors, the granting of the only instruction given for the state, which is as fol-

lows: "The court charges the jury, for the state, that if you believe from the evidence beyond a reasonable doubt that the defendant unlawfully and feloniously took, stole, and carried away the finger ring, of the value of thirty-five dollars, of the property of M. Jacobs, as charged in the indictment, then it is the sworn duty of the jury to find the defendant guilty as charged in the indictment."

He also assigns as error the action of the court in permitting the district attorney to cross-examine the defendant, who testified in his own behalf, as to certain alleged wrongful dealings with an associate in the state of Louisiana. He had no counsel in the lower court, and his evidence shows that he first referred to the dealings in Louisiana, and the district attorney, without any objection from him, went into the matter further on cross-examination.

On appeal, one of the assignments of error is predicated on certain remarks alleged to have been made by the judge to the jury as they were retiring to consider their verdict, to wit: "Hurry back, gentlemen. We have another case to try this morning, and we want to get through." The record, however, shows that no bill of exception was taken, and the remarks of the court, if made at all, are not preserved in the record.

D. B. Cooley, for appellant.

To constitute the offense of larceny, the goods alleged to have been stolen must have been wrongfully or fraudulently taken and carried away, with the intent to convert them to the taker's own use. If there be no such intention, it amounts to a trespass only, and not larceny. If the taken be open and in the presence of the owner, or other persons, it carried with it evidence that it is only a trespass.

To constitute larceny, a felonious taking is essential. If the original taking is lawful and in good faith, a sub-

sequent fraudulent conversion is not larceny, because there is no trespass. *McDaniel* v. *State,* 8 S. & M. 401; *Littlejohn* v. *State,* 59 Miss. 276; *Buchanan* v. *State,* 5 So. 618; *Beatty* v. *State,* 61 Miss. 18.

I submit that it is only necessary to define the offense of larceny to demonstrate, beyond question, that the evidence in this case wholly fails to make out the crime of larceny. Was there a trespass in the taking of the ring? That the defendant came into the lawful possession of the ring is established by the evidence of every witness. The ring was delivered to defendant by Jacobs after the price was agreed upon; and the only conflict in the evidence is as to the time when the ring was to be paid for. There being no trespass in the taking of the ring by the defendant, the giving of any instruction, predicated upon the guilt of the defendant of the crime charged against him, was error. A taking by the voluntary consent of the owner, or his authorized servant or agent, even though with a felonious intent, does not constitute larceny. *Lowe* v. *State,* 32 So. 956.

Where the owner of a bill intrusts it to another to take away and get changed and return with the change, the possession of the bill is intrusted to him; and if he afterwards makes off with it, it is not larceny but a breach of trust; 25 Cyc. 25.

J. M. Vardaman, for the state.

The first two assignments of error relate to the instruction given the state by the court and the refusal of the court to instruct the jury to find defendant "not guilty." From a careful reading of the record in this case, I am of the opinion that the facts justified the court in letting the matter go to the jury and submit that the court did this in the proper manner and that his action should be upheld.

The third assignment of error relates to the district attorney being allowed to introduce evidence of appel-

lant's wrongful dealings with a Colonel Faigan in Louisiana. The record in this case shows that the only mention of appellant's dealing with Colonel Faigan appears in appellant's own testimony, which was a voluntary statement by him and I submit that he cannot be heard to complain at this late day of his own error. I assume that the pricks of his conscience prompted him to make the statement complained of.

As the fourth and fifth assignments relate to the law and evidence of the case, I will let the record speak for itself.

The fifth assignment of error is as follows: "Because the court erred in using, substantially, the following language to the jury when it was retiring to consider its verdict, to wit: 'Hurry back gentlemen; we have another case to try this morning, and we want to get through.' "

If any objection was to have been taken to this remark it should have been done by setting the remark out in a special bill of exceptions as provided for in the Code, and I submit that the failure of counsel to take this step precludes this court from passing on this question. Granting for the sake of argument that the remark is properly in the record, I can see absolutely no prejudice to defendant contained therein. The remark complained of was simply an admonition to the jury by the trial judge that they should be diligent in their work and not while away their time as some juries are prone to do, and I think the court should be complimented on its desire to push the work of the court rather than criticized for it.

Counsel for appellant in his brief contends that this action of defendant does not constitute the crime of larceny. A case exactly on all fours is set out in 25 Cyc. 25.

"Where parties are engaged in a cash sale the whole transaction is incomplete until the payment is completed; and the possession of the goods remains in the seller and that of the money in the buyer until they are simul-

taneously exchanged. If in such case the buyer gets control of the goods and makes off with them without payment for them he is guilty of larceny." 25 Cyc. 25, and cases cited thereunder.

The above facts are exactly the same as the facts in the case at bar. Appellant bought the ring, skipped out and refused to pay for it and under the almost unanimous holding of the courts I submit that he is guilty of the crime charged.

SMITH, C. J., delivered the opinion of the court.

Appellant was convicted in the court below of the crime of larceny. Mr. M. Jacobs was engaged in the jewelry business in the town of Laurel. One day appellant entered his store and asked to be shown a ring. He selected one that he seemed to like, worth thirty-five dollars, and according to the evidence of Jacobs he said that before he purchased it he would like to show it to a man named Sommers, for whom he was working. To this Jacobs says he agreed, and appellant left the store with the ring, ostensibly for the purpose of showing it to Sommers, before deciding whether or not he would purchase it. Instead of doing this, however, he left Laurel and came to Jackson, bringing the ring with him, and there pawned it at a pawnshop. According to the evidence of appellant, he purchased the ring from Jacobs on credit.

The assignment of error mainly relied on is that the verdict was not warranted by the evidence; appellant's contention being that no larceny was shown, because under Jacobs's testimony he came lawfully into the possession of the ring, and therefore the subsequent conversion thereof did not constitute larceny. The proposition of law here relied on is a correct one; but, while that is true, it is also true that if the possession of property is obtained fraudulently, with the felonious intent existing at the time to deprive the owner thereof, and the person so obtaining it does in pursuance of such intent deprive

the owner of the property, larceny is thereby committed. *Watson* v. *State,* 36 Miss. 593, 25 Cyc. 40.

On Jacobs' testimony it was for the jury to say whether or not appellant had fraudulently obtained possession of the ring with intent then and there to steal it. The jury were not instructed along this line, but the court was not required so to do unless requested.

The first instruction complained of simply defines larceny, and is therefore unobjectionable.

There is no merit in the objection here urged to the evidence brought out by the district attorney on the cross-examination of appellant, who testified as a witness in his own behalf. The matter inquired into had been testified to on the examination in chief, and, moreover, the cross-examination was conducted without objection being interposed thereto.

The record does not disclose that the circuit judge made the statement to the jury attributed to him in the assignment of error, and therefore it is not presented for our consideration.

Affirmed.

MRS. MELZIE SPIVEY v. ROXIE WALTON *et al.*

[64 South. 937.]

WITNESSES. *Code* 1906, *section* 1917. *Disqualification. Estate of deceased.*

The rule of evidence as contained in section 1917, Code 1906, providing that "a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person which originated during the lifetime of such person," applies only to the person who has a claim or defense against the estate of a deceased person, it does not apply to the wife of such person.

APPEAL from the chancery court of Neshoba county.
HON. J. F. MCCOOL, Chancellor.

Will contest between Mrs. Melzie Spivey and Roxie Walton and others. From a judgment in favor of the latter, the former appeals.

Luke Spivey and his wife, Mrs. Jennie Spivey, executed what purported to be a last will and testament, making the sole beneficiary of same their son, B. A. Spivey, who was unmarried, and who lived with them. Prior to the execution of this instrument, Luke Spivey had conveyed to his wife the title to the property here in dispute. Shortly after the execution of this purported will, Mrs. Jennie Spivey died. Soon after her death, her son, B. A. Spivey, married the appellant, Melzie Spivey. A short while thereafter B. A. Spivey died, and before the end of the year Luke Spivey died. Appellant thereafter probated the will of Luke and Jennie Spivey, devising all their property to B. A. Spivey, the deceased husband of the appellant. Issue *devisavit vel non* was made up, and by agreement a jury was waived.

Prior to the probation of said will, appellees, who are the heirs at law of Luke and Jennie Spivey, had filed a bill for partition, asking that the lands devised in the said will be divided among the heirs at law. It was agreed between counsel that both issues should be submitted to the chancellor, without a jury, on the same evidence. The chancellor, after hearing the evidence, held that the instrument was not the last will and testament of Luke and Jennie Spivey, that they were not of sound mind at the time of the execution of same and ordered that the property be sold for partition and the proceeds divided among the heirs at law.

On the trial, the husbands of certain of the appellees were permitted to testify as to the mental condition of Luke and Jennie Spivey at the time of the execution of the purported will. The admission of their testimony is assigned as error.

T. W. Wilson, H. H. Rodgers and *Flowers & Brown,* for appellant.

We desire to call the attention of the court to what we consider the real error, if error at all, committed by the trial court. This error is the admission of the testimony of the witnesses Walton, Ingram and Parker, the husbands of complainants or rather of the contestants. Under the doctrine announced in the *Whitehead case,* 61 So. 737, it would have been error to allow the wives of these parties to testify as to the sanity of the testator, and following the rule laid down in that case we are of the opinion that since the husband and wife are of "one flesh," and it would be error to permit one to testify, it would be certainly error to permit the other to do so. In other words, if by permitting these ladies to testify as to the inability of Mrs. Walton to make this will, section 1917 of the Code would be violated, in that they would be in effect establishing their claim against the estate of a dead person which originated during his lifetime; then we say that they cannot allow their husbands to come in and say "here am I, send me." Will anyone be heard to say that the estate of the husband is not the estate of the wife and *vice versa?* If this is not the law, then the doctrine in the Whitehead case, *supra,* will amount to but very little. It will in effect be nullified.

We are aware of the fact that this record presents a finding by a chancellor on a question of fact. We are also aware of the reluctance with which this court disturbs such a finding. But when a record contains a finding which was arrived at by the admission of incompetent testimony we are of the opinion that the court will not hesitate to reverse such finding.

It seems that there is very strong evidence in this record to show that Mrs. Spivey really intended to leave all her property to her son B. A. Spivey. This boy is dead now and this is an attempt to take from his widow the property which he inherited from his mother. The san-

ity or insanity of Luke Spivey, the father of appellant's husband ought not to enter into this controversy. He had, long before her death, conveyed this property to his wife, Mrs. Jennie Spivey, under whom this appellant is claiming. The mere fact that Luke Spivey may not have been of sound mind makes no difference one way or the other so far as this case is concerned. It seems that it was just thrown in for ballast.

We ask the court to consider this contention and if we are correct, to reverse the case.

G. E. Wilson, attorney for appellee.

REED, J., delivered the opinion of the court.

There is ample testimony to support the decree of the chancellor in favor of the contestants, on the trial of the issue *devisavit vel non* in this case. The instrument propounded for probate was decreed to be not the true last will and testament of Luke Spivey and Jennie Spivey, his wife, and its probate was refused. Contestants are heirs at law of Mr. and Mrs. Spivey.

In one of the briefs for appellant, counsel claim that the chancellor committed error in admitting the testimony of the husbands or several of the contestants tending to show the mental incapacity of Mr. and Mrs. Spivey. The following, taken from the brief, gives counsel's contention: "Under the doctrine announced in the *Whitehead case,* 61 So. 737, it would have been error to allow the wives of these parties to testify as to the sanity of the testator, and, following the rule laid down in the case, we are of the opinion that since the husband and wife are of 'one flesh,' and it would be error to permit one to testify, it would be certainly error to permit the other to do so."

We do not see anything in section 1917 of the Code of 1906 providing that "a person shall not testify as a witness to establish his own claim or defense against the

estate of a deceased person which originated during the lifetime of such person," nor in the case of *Whitehead* v. *Kirk, supra,* discussing the statute, to sustain counsel's position. The quotation by Judge COOK in the Whitehead Case of the words in Gen. ii, 24, "Therefore shall a man leave his father and his mother, and shall cleave unto his wife; and they shall be one flesh," was made in that part of the opinion discussing and deciding the question of the wife's competency to testify "concerning the acts and words of her husband, done and said under the protection of confidential communication between husband and wife."

The importance of the unity of husband and wife in matters pertaining to the marriage relation and in their association with each other as conjugal partners is beyond question. We also bear in mind that under the common law there is a unity of the couple, and disabilities to the wife by reason of coverture. This, however, has been changed by the statutes of Mississippi. The married woman has been fully emancipated. As to property rights, the right to contract, as well as with other rights and liabilities, the husband and wife are separate, and are not one.

The rule of evidence as contained in section 1917 of the Code of 1906 applies only to the person who has a claim or defense against the estate of a deceased person. It will not apply to the spouse of such person. The chancellor did not err in admitting testimony of the husbands of several of the contestants.

Affirmed.

CHARLES PALOTTA v. JACKSON LIGHT & TRACTION CO.

[64 South. 938.]

1. STREETS. *Law of the road. Code* 1906, *section* 4412. *Standing teams.* Whether Code 1906, section 4412, regulating the passage of vehicles on highways applies to streets in a city or not, the same rule there prescribed has grown into a custom which as a part of the common law, is applicable to streets and the courts will take judicial knowledge of this custom.

2. SAME.
Where the driver of a vehicle driving on the right side of a street finds a vehicle already on that side he is justified in turning to the left, since "that which is not otherwise lawful, necessity makes lawful."

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by Charles Palotta against the Jackson Light & Traction Company. From a judgment for defendant, plaintiff appeals.

Appellant brought suit for damages for injuries alleged to have been sustained by him. The case was submitted to a jury, who returned a verdict for defendant.

The appellee owns a street railway system in the city of Jackson, Mississippi; a part of the line extending over what is known as West Capitol street. Between Gallatin street and Lemon street, a distance of about four blocks, the city had laid pavements, and at a subsequent date had ordered the street railway to pave between the tracks. That part of the line is a single track, and in order to pave it was necessary to take up the track, so that for some time the cars could not run over it. The material had been assembled on the north side of West Capitol street, between Gallatin and Lemon streets, and north of the right of way of the street railway, so that it became necessary for traffic to use the south side of

Capitol street, south of the right of way of the street railway. For the accommodation of the passengers on the cars of the appellee the appellee operated a large cab between Gallatin and Lemon streets, so that the through passengers, disembarking from the cars, would be given a transfer and carried over the distance between Gallatin and Lemon streets in this cab, and use their transfers when they again boarded the appellee's cars.

Appellant was a passenger going west on one of appellee's cars. When the car reached Gallatin street, the passengers all got out, and a large number of them got into the cab, filling it up before appellant could get a seat. Appellant thereupon got on the step of the cab and held to the window sash. The evidence is conflicting as to whether he was acting with the knowledge and consent of the driver of the cab, who was in the employ of the railway company, or whether the driver protested. The cab proceeded west on the south side of Gallatin street and south of the right of way of the railway company. Another vehicle occupied that part of the street nearest the railway right of way, so that the driver of the cab turned to the left to pass his vehicle, and appellant, who was on the steps on the left-hand side, was scrapped against a telephone pole standing between the curb and the sidewalk, and thrown from the step and injured.

It is the contention of the appellant that section 4412 of chapter 123 of the Code of 1906, the subject-matter of which is "Roads, Ferries and Bridges," applies to the streets of municipalities as well as to public roads, and that the driver of the cab in question was guilty of negligence in not driving to the right in passing the other vehicle. Said section is as follows:

"4412. Traveling on Public Roads.—All drivers of carriages or other vehicles, whether of burden or pleasure, using any public road, when met by another carriage or vehicle, shall keep to the right hand, and when over-

taken by another carriage or vehicle shall also keep to the right hand, so as, in both cases, to permit the carriage or vehicle so meeting or overtaking to pass free and uninterrupted; and any person willfully offending against this provision shall be guilty of a misdemeanor, and, on conviction, fined five dollars for each offense; and if injury result therefrom, the person so offending shall be subject to an action for damages at the suit of the party injured."

Howie & Howie, for appellant.

It was not disputed but that the conductor drove to the left of the street in passing. The accident could not have happened if he had driven to the right as there was no post there to hurt appellant. The court was asked to instruct the jury regarding the law of the road on the part of the plaintiff. Both those instructions were refused. Not only that but the instruction asked by the appellee which was directly in the face of the law, was given.

Under the common law "a traveler is ordinarily liable for accident caused by his failure to keep to the right, but may not be liable even though he drove to the left, if that was not the proximate cause of the accident." The first instruction was drawn so as to exactly fit this rule. It was refused. If the jury believed that this driving to the left was the proximate cause of the accident then they should have been instructed to find for the appellant. This was bad enough if nothing else had been done, but when it is remembered that the court instructed the jury for the appellee that this law was not applicable, it was worse. See 37 Cyc., p. 270.

The second instruction was drawn under the statute. Section 4412 of the Code, 1906, which provides with reference to parties that are hurt by driving to the left "If injury result therefrom, the person so offending shall be subject to an action for damages at the suit of the party

injured." It is contended that this applies only to "country public roads." This construction of the statute is not proper. The meaning of the statute is that it is intended to cover all public highways; road here is used as synonymous with highway.

"In its broadest sense the term "road" is synonymous with "way," and thus applies to any place set apart and appropriated, either *de juri* or *de facto,* for the purpose of free passage, whether by public authority or by general license or permission of the owners of the land. More commonly in legal acceptation the term road is synonymous with highway." See 37 Cyc., p. 16. Under this definition, which is universally accepted as being correct, Capitol street would certainly be a highway or public road within the meaning of the Code section. "The law of the road extends to all public highways however created." 37 Cyc., p. 269.

We submit therefore that the court erred in not giving both of the instructions asked by the appellant regarding the law of the road and also in granting the instruction asked by the appellee which stated that this law did not apply. These errors were fatal to the case of the appellant and the judgment in this case should be reversed on account of this error.

Wells, May & Sanders, for appellee.

The instructions which were given for the plaintiff in this case were the full measure of his rights and properly stated the duty and liability of the defendant, and the refused instructions which were asked on behalf of the plaintiff were properly refused.

What is denominated as "the law of the road" has no application to a case where the circumstances are such as are presented by this record. The law of the road, according to its technical signification, applies only to drivers of vehicles which are in motion on the public roads of the country, and have no application to the crowded

streets of the city, and especially to a situation where the streets of the city have been, by the city itself, torn up and disturbed to such an extent as to allow only a narrow passageway for vehicles on one side of the street of a much traveled street.

The right result has been reached in this case and we respectfully submit that the judgment of the lower court should be affirmed.

SMITH, C. J., delivered the opinion of the court.

The court below refused, though requested by appellant so to do, to submit to the jury the question of whether appellee's "driver was negligent in not driving to the right," instead of to the left, of the road on the occasion in question, and granted, at the request of appellee, an instruction "that what is known as the law of the road only applies to drivers of vehicles which are in motion on the public roads of the country, and the statutes which prescribe the rule of conduct denominated as the law of the road have no application in this case."

It is unnecessary for us to determine whether or not section 4412 of the Code applies to the streets within a municipality, for the reason that, even should it be held not to apply thereto, it but announces a custom so long and universally observed as to be, in the absence of a statute, a part of our common law applicable to all highways. 37 Cyc. 269; 2 Elliott, Roads and Streets (3 Ed.), sec. 1078. In England the rule is that "in meeting, each party must keep to the left," and according to Elliott, *supra,* in a note to section 1079, "this rule is thus stated in an old rhyme:

"'Tis a law of the road
Though a paradox quite,
If you keep to the left,
You'll always be right.'"

With us, however, the rule is that, when persons meet on a highway, each must keep to the right, and "if there

is no statute upon the subject, proof of this custom is not necessary, for the court will take judicial knowledge of it." Elliott, *supra,* sec. 1080; *Lee* v. *Foley,* 113 La. Ann. 663, 37 So. 594.

This rule, however, is not an inflexible one, and circumstances may arise which will make it necessary to violate it. In the case at bar it is beyond question that, when appellee's vehicle approached the place where the accident occurred, the right side of the street was occupied by a wagon, and, since two bodies cannot occupy the same space at the same time, there was nothing for appellee's driver to do but turn to the left. He was therefore justified in so doing, for "that which is not otherwise lawful, necessity makes lawful, and necessity makes a privilege which supersedes the law."

It follows, therefore, that the court below committed no error in refusing to grant the instruction requested by appellant, and that no harm resulted to him by reason of the granting of the instruction requested by appellee, for the reason that appellee was entitled to an instruction charging the jury that in so far as the law of the road is concerned its driver was justified in turning to the left.

There being no merit in the other matters complained of, the judgment of the court below is affirmed.

Affirmed.

W. D. CORLEY v. B. D. RIVERS.

[64 South. 964.]

MASTER AND SERVANT. *Disobedience of rules. Ground for discharge.*

The owner has the right to make reasonable rules for the government of his plantation and where a manager of such plantation refuses to obey these rules the owner has the right to discharge him.

APPEAL from the circuit court of Tallahatchie county.

HON. N. A. TAYLOR, Judge.

Suit by R. D. Rivers against W. D. Corley. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Dinkins, Caldwell & Ward, for appellant.

The well-established rule of law is, that if a person employed for a specified term is wrongfully discharged before the expiration of the term the employer is liable to pay him such damages, not to exceed the full wages for the whole time specified in the contract as he may sustain on account of being discharged, less what he has earned in the meantime or what he might have earned by due diligence in seeking employment. See, *Birdsong* v. *Ellis,* 62 Miss. 418; *Hunt, Admr., etc.,* v. *Crane,* 33 Miss. 669; *Prichard* v. *Martin,* 27 Miss. 305; 105 U. S. 1117; 178 U. S. 953; 7 Current Law, p. 1053; *The New Orleans, Jackson & Great Northern Railroad Co.* v. *Echols,* 54 Miss. 264.

While it may be true that the evidence shows that the defendant discharged the plaintiff, it is also true that it shows a justification of such discharge, and if the defendant was justifiable in discharging the plaintiff, then certainly he would not be entitled to recover of the defendant, damages on account of such discharge. It is

shown by the evidence in the case that plaintiff was having trouble with the labor on defendant's plantation. Several instances of personal difficulties between plaintiff and laborers on the plantation is shown by the evidence. Plaintiff himself testifies to such personal difficulties. There is no proof that the services of the plaintiff were satisfactory; on the contrary it is very plainly shown that his services were not satisfactory. See the testimony of the defendant, W. D. Corley; also the testimony of the witnesses with reference to the personal difficulties between plaintiff and the laborers on the plantation of defendant. The plaintiff himself admitted that he had had personal difficulties with the laborers on the place.

Admitting, for the sake of argument, that defendant discharged the plaintiff without sufficient cause, and that the then existing contract ended, it is our contention that it was the duty of the plaintiff under the law, to use reasonable diligence to prevent the damage sued for, to make reasonable exertions to prevent loss for want of employment for the term of the contract, and that his refusal to accept the unconditional offer of the defendant to take him back or continue him in defendant's employ, shows want of due diligence on the part of plaintiff. See *Birdsong* v. *Ellis,* 62 Miss. 418.

P. H. Lowerey, for appellee.

There can be no merit in the contention of counsel for appellant that the one instruction given by the court below for the appellee is an improper statement of the law in this case, and therefore calculated to mislead the jury in reaching its verdict. The instruction referred to is a clear and concise statement of the law in this case and in cases of this kind and is *verbatim* with the instruction approved by this court in *Pritchard* v. *Martin,* 27 Miss. 305.

If, as counsel contends, the jury was misled under the one instruction given by the court below for appellee in

reaching its verdict, such was remedied by the remittitur of seventy-eight dollars ordered by the court below when the motion for a new trial in this case was overruled.

We agree with counsel for appellant that the well-established rule of law is: "That if a person employed for a specified term is wrongfully discharged before the expiration of the term, the employer is liable to pay him such damages, not to exceed the full wages for the whole time specified in the contract, as he may sustain on account of being discharged, less what he has earned in the meantime, or what he might have earned by due diligence in seeking employment," but we respectfully submit that the one instruction granted by the court below for the appellee is not in conflict with the well-established rule of law above-mentioned.

The testimony of appellee and also the testimony of his father, L. N. Rivers, is that appellee was not idle after his discharge and during the term of his contract but diligently sought employment and even did menial work for one month and a half. Therefore, the finding of the jury and the judgment of the court under the one instruction for the appellee above referred to and instruction number 3 given by the court below for appellant, are well founded. *Pritchard* v. *Martin, supra; Birdsong* v. *Ellis,* 62 Miss. 418.

Argued orally by *J. D. Stone,* for appellee.

REED, J., delivered the opinion of the court.

Appellee was employed by appellant for one year from January 19, 1911, as manager of a plantation. In April, 1911, after a service of something over two months, appellee was discharged. He received payment of two monthly installments of his salary. This suit was brought for the balance alleged by him to be owing for the year. The jury returned a verdict in his favor for the full sum claimed. Upon motion for new trial the court required a

remittitur for the amount which appellee had received during the year from other employment after he was discharged.

Appellant had rules for the government of his plantation. Under these, the manager was enjoined not to abuse or whip tenants, and he was not permitted to carry a pistol. If a tenant refused or failed to work, or became disorderly, so that his conduct might bring on trouble, or if the manager became dissatisfied with the tenant, he was to be removed from the plantation peaceably and at the owner's expense. It was the owner's purpose to avoid all manner of disturbances and encounters between the manager and tenants, and to secure quiet and orderly conduct on his property.

The evidence shows that appellee had trouble with the tenants. He whipped two of them on different occasions. Thereupon appellant informed appellee that he did not want his tenants abused and whipped, and that appellee ought not to carry a pistol. Apellant further said that appellee must get rid of the one he was carrying or he would be discharged. Appellee refused to give up his pistol and left the employment.

The refusal of the court to sustain a motion for a new trial and set aside the jury's verdict, because it was contrary to the law and the evidence, is assigned as an error in this appeal. We consider this assignment well taken. Appellant, as owner, certainly had the right to adopt reasonable rules and regulations for the government of his plantation affairs. The rules shown in this case are reasonable. We commend them. To us they seem consistent with justice and the fair administration of the law in the land. The owner must have found them advisable for the successful management of his business.

When appellee entered the service of appellant, it became his duty to observe these rules. His failure to comply with them was sufficient to render his services as manager unsatisfactory, and to justify appellant in dis-

charging him. Had he been willing to obey the plantation regulations made by the owner, he could have completed his term of employment, and need not have lost his position.

Appellant should only be held liable to pay for the balance owing for services up to the time when appellee left the plantation. Upon the trial, appellant tendered this amount. Judgment should have been for the same, with such costs as may have accrued in the case till the tender was made.

Reversed and remanded.

Southern Railway Company v. North State Cotton Company.

[64 South. 965.]

Carriers. *Bills of lading. Interstate commerce. Code* 1906, *section* 4851.

Since the adoption by Congress of the Carmack amendment the Interstate Commerce Act of February 4, 1887 (Act June 20, 1906, chapter 3591, section 7, 34 Stat. 393, U. S. Comp. St. Supp. 1911, page 1307), covering the subject of bills of lading for interstate shipments, section 4851 of Code 1906, making bills of lading conclusive in the hands of *bona fide* holders for value, against the person or corporation issuing them, that the property described therein was received by the carrier, has no application to interstate shipments of freight.

Appeal from the circuit court of Alcorn county.

Hon. J. H. Mitchell, Judge.

Suit by North State Cotton Company against the Southern Railway Company. From a judgment for plaintiff, defendant appeals.

Plaintiff sued defendant for the value of certain cotton shipped over defendant's railroad from Corinth, Mis-

sissippi, to points in North Carolina, alleging that defendant had issued its bill of lading covering said cotton; said bill of lading being in favor of one Latham, and by Latham assigned to plaintiff. When said cotton was delivered to Latham, there was a large shortage in weights. However, it was admitted it was the identical cotton received by and shipped over the line of appellant's railway. It is alleged that said cotton was shipped with bills of lading attached to sight draft, which draft was paid, the basis of settlement being upon the weights set out in the bill of lading, and that therefore the railroad company, having issued its bill of lading, was bound by the weights sets out therein, under section 4851 of the Code of 1906. The case was tried on an agreed state of facts, a jury being waived, and the court gave a judgment for plaintiff, and the defendant appeals.

W. J. Lamb, attorney for appellant.

Thos. H. Johnston, attorney for appellee.

Cook, J., delivered the opinion of the court.

The facts of this case are, in all essential particulars, identical with the facts in *St. Louis & S. F. R. Co.* v. *Woodruff Mills,* 62 So. 171. This case, as well as the case cited, is controlled by the Carmack amendment to the Interstate Commerce Act, and the decisions of the Supreme Court of the United States construing same. Section 4851, Code 1906, does not apply to interstate shipments, and the trial court erred in holding the contrary.

It follows that the judgment of the circuit court will be reversed, and judgment will be entered here for appellant, defendant below.

Reversed.

W. N. HARDIN v. C. W. MCKNIGHT et al.

[64 South. 965.]

BANKS. *Action against directors. Demand on receiver.*

A declaration which avers that plaintiff was a depositor of a bank and that defendants were directors of said bank and wilfully and negligently failed to perform their duties as directors and failed, neglected and refused to supervise the business of the bank, and that because of the directors' negligent failure and refusal to perform their duties, the bank had become insolvent and a receiver had been appointed to wind up its affairs and in consequence, plaintiff lost his claim against the bank, is demurrable because it does not allege that the receiver of the bank had been requested to bring suit and had refused to do so.

APPEAL from the circuit court of Tishomingo county.

HON. J. H. MITCHELL, Judge.

Suit by W. N. Hardin against C. W. McKnight and others.

From a judgment sustaining a demurrer to plaintiff's declaration, plaintiff appeals.

Appellant was plaintiff in the court below, and appellees were defendants. Plaintiff filed a declaration in the circuit court, alleging that defendants, who were directors of a banking institution, had knowledge of its insolvency and allowed him to make deposits in said bank, which soon afterwards was declared insolvent and placed in the hands of a receiver, thus causing plaintiff to lose a large amount of money.

The defendant pleaded the general issue and filed several special pleas, which were in effect that a receiver had been appointed, and that he had brought suit for the creditors, and that the receiver alone had authority to bring this suit. Plaintiff moved to strike out defendants' pleas, the motion was overruled, and plaintiff next demurred to defendants' pleas, and the court overruled

the demurrer. Counsel for defendants then moved the court to extend plaintiff's demurrer back to his declaration, and the court sustained the motion, and plaintiff appealed.

Lamb & Warriner, for appellant.

The principle contended for in this case is, whether or not a depositor of a bank has the right to sue individually the directors of the bank for their neglect of duty and recover from them the amount of his deposit which he lost because of the neglect of duty on the part of the directors of the bank. The trial judge held that an individual could not maintain a suit of this kind, but that the receiver should bring a suit for the benefit of all of his depositors. We do not agree with this holding of court and think that the appellant in this cause has a perfect right to maintain this action and recover from the directors because of their neglect of duty.

We think the case at bar falls within the principal announced by this court in the case of *Blumer* v. *Ulmer et al.,* 44 So. 161, and while the declaration in the case at bar does not use the word deceit, it does clearly appear however that it was the deceit on the part of the directors in allowing the bank to continue to run, which caused the appellant to lose his money. The court in the last-cited case says as follows: "It seems to be a suit brought by the depositors for fraudulent deceit practiced upon them by the directors of the company in inducing complainants to make their deposits. The bill asserts a cause of action subsisting immediately in the hands of the complainant, and not a cause of action subsisting in the right of the corporation. And the complainants so place their case before this court." *Blumer* v. *Ulmer et al.,* 44 So. 161.

We have the principle contended for in this case sustained by this court in the case of *Wolfe* v. *Simmons,* 75 Miss. 540, in which the court said as follows: "The bank

failed some time in January following, without having paid H. Wolfe & Company, the contents of the draft, and they brought this suit against the directors of the bank, individually, to recover the same. The cause of action, as contained in the written statement of it filed before the justice of the peace, is not certain and definite yet the evidence given, and that offered, but rejected by the court, discloses a purpose on the part of the plaintiff to charge the directors of the bank on the ground of fraud. The plaintiffs offered to prove that the bank was insolvent to the knowledge of the directors, and that some of the directors had misappropriated the assets of the bank; to show whether regular meetings of the directors of the bank had been held, and the character of the supervision given by the directors to the concerns of the bank; to show the state of the account between Gidwitz and the bank, and other like evidence, all of which was excluded." *Wolfe* v. *Simmons, et al.,* 75 Miss. 539; *Solomon* v. *Bates,* 54 Am. St. 730, 731; 1 Morse on Banking, sec. 138; 17 Am. & Eng. Ency. of Law, 109; *Delano* v. *Case,* 121 Ill. 247, 2 Am. St. Rep. 81; *Seale* v. *Baker,* 8 Am. St. Rep. 592; *Marshall* v. *Farmers & Mechanics Savings Bank of Va.,* 2 L. R. A. 534.

J. E. Berry, for appellees.

The first proposition, viz.: that the receiver had authority to bring this action, is too well recognized to be questioned or to require citation of authorities. We pass therefore to the second proposition, which is the bone of this contention. Under the averments of plaintiff's declaration, did the authority to bring this action lie solely within the receiver?

In 34 Cyc. under Receivers, page 388, the general rule is laid down as follows: "The general rule is that a receiver takes the rights, causes and remedies which were in the corporation . . . whose receiver he is, or which were available to those whose interests he was appointed to represent."

Subsequently on page 403 referring to the above rule, it says: "Following the rules above stated, a receiver, who for the purpose of litigation, succeeds to the rights of a party to the suit in which the appointment is made, alone can sue to enforce such rights; the right to reach the assets of an insolvent being in a receiver, it is to be exercised by him and not by the creditors or stockholders, unless the receiver has refused to sue, and the court will restrain an interference with the receiver's rights in this respect."

In support of this rule we cite 2 Thompson on Corporations, sec. 1316, where it is said: "It is now practically everywhere conceded that the receiver succeeds to the title of the corporation, and whatever rights it may have asserted against its unfaithful directors, such receiver may also enforce against them. . . . A receiver of an insolvent corporation succeeds to the title of the property and rights of action of the corporation when so invested by statute or by decree of the court appointing him, and is the proper party to a suit to enforce them by legal proceedings. If a right of action against the directors exists in favor of the corporation, this action is prosecuted in the name of the receiver. The rule in Federal courts is that the receiver of an insolvent national bank may enforce, for the benefit of the stockholders, creditors, or depositors, any liability of its directors for nonperformance or negligent performance of their duties."

In 3 Cook on Corporations, section 735, it is specifically stated that a simple creditor may not institute a suit to make officers account for fraudulent or *ultra vires* acts; and subsequently, in section 740, it is said that before any suit is brought against the directors for fraudulent or negligent acts of the directors, request must first be made of the receiver, and if he refuse or fail so to do, suit may be brought by a creditor who must allege these facts in his bill of complaint. This is the exact holding

in the case of *Porter* v. *Sabin*, 149 U. S. 473, and in *Flynn* v. *Brooklyn R. R. Co.*, 158 N. Y. 493.

Counsel for appellant especially relies on the case of *Blumer* v. *Ulmer*, 44 So. 161, and *Wolfe* v. *Simmons*, 75 Miss. 539.

As for the case of *Wolfe* v. *Simmons*, referred to above, on which counsel so strongly relies, we have but to call the court's attention to the fact that there the court was passing upon a rule of evidence, while here we are considering a question of pleading. The cases are in no sense parallel. In the Wolfe case no court of equity had obtained jurisdiction, and therefore the creditors were in no way prevented from pursuing their legal remedies. The opinion in the Wolfe case certainly throws no light on the question here presented. There being no receiver, and no court of equity having taken jurisdiction, the holding in the case of *Wolfe* v. *Simmons*, gave this plaintiff no authority whatever to bring suit, and it settles no question in this case.

Appellant also cites with approval the case of *Solomon* v. *Bates* (N. C.), 54 Am. St. 730, but an examination of that case shows fraud on the part of defendants directly perpetrated upon plaintiff, hence it is not a parallel case to the one at bar, but rather falls into the class of the Plumer case already discussed.

We insist therefore that since the declaration alleges no grounds upon which to bring this suit, then plaintiff has no standing in court. The defendants' pleas must of necessity be construed as absolute bars to plaintiff, since they deny him any right whatever to bring suit, and if they are pleas in bar, then under section 741 of the Code, defendants are not guilty of mispleading. We insist, therefore, that the lower court was correct in overruling plaintiff's motion to strike out defendants' pleas for want of proper pleading, and in view of the authorities cited, we ask that the trial court be sustained.

COOK, J., delivered the opinion of the court.

The declaration in this case avers that appellant was a depositor of the Tishomingo Savings Bank, a corporation doing a general banking business; that appellees were directors of said corporation and "willfully and negligently failed to perform their duties as directors, and failed, neglected, and refused to supervise" the business of the bank; that, because of the directors' negligent failure and refusal to perform their duties, the bank had become insolvent and a receiver had been appointed to wind up its affairs, and in consequence appellant lost his claim against the bank, and therefore plaintiff demands judgment against the directors for the amount of his claim against the bank. There was much pleading unnecessary to set out. In the end, plaintiff demurred to the defendants' pleas, which demurrer was by the court applied to the declaration, and, from the judgment of the court dismissing the cause, this appeal is prosecuted.

The declaration does not aver that the receiver of the bank had been requested to bring this suit and had refused to do so, and, failing in this, the trial court was correct in applying and sustaining plaintiff's demurrer to his own declaration.

Affirmed.

NEW ORLEANS GREAT NORTHERN RAILROAD CO. *v.* JOHN FORTENBERRY.

[64 South. 966.]

LIMITATION OF ACTIONS. *Code* 1906, *section* 3114. *Applicability.*

Section 3114, Code 1906, providing that suit cannot be maintained in this state on a cause of action accrued in another state, where defendant has resided before residing in this state, if under the statute of limitations in that state, the action cannot there be maintained, applies only where a nonresident, in whose favor the statute had accrued, afterwards removes into this state, and hence a railroad company which, during the period pleaded as a bar, was operating a railroad in this state and therefore sueable as a resident here, cannot plead said statute against an action brought in this state for personal injury inflicted in another state, where the statute of limitations would, if suit were there brought, bar the action.

APPEAL from the circuit court of Marion county.

HON. A. E. WEATHERSBY, Judge.

Suit by John Fortenberry by next friend against the New Orleans Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals.

Appellee, by his next friend, brought suit against the appellant in the circuit court of Marion county, Mississippi, for injuries sustained by him while a passenger on one of the trains of appellee going from New Orleans, Louisiana, to Columbia, Mississippi. The injury occurred at Bogalousa, Louisiana. The appellant, railroad company, has a line of road running in both states, and is chartered under the laws of both states. The suit in question was not begun until more than one year after the injury occurred, and the railroad company filed a plea that the cause of action was barred by the statute of limitations of one year of the state of Louisiana. The statute of limitations had not run against the cause of ac-

tion in the state of Mississippi. The railroad claimed that since the accident occurred in the state of Louisiana, suit could not be brought in the state of Mississippi. The plaintiff demurred to this plea, and the demurrer was sustained. The case then went to trial on a plea of general issue, and a plea of contributory negligence, and resulted in a jury and verdict for one thousand dollars. The railroad company appeals on the ground that section 3114 governs the case. Said section is as follows: "Section 3114. (2754) Action Barred in Another State Barred Here.—When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state or country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state."

Henry Mounger, for appellant.

It is not controverted that the New Orleans Great Northern Railroad Company is a railroad company organized both under the laws of the state of Mississippi and under the laws of the state of Louisiana. That the cause of action accrued on account of an alleged injury resulting from the negligence of the defendant while its train was at Bogalousa in the state of Louisiana. That by the laws of the state of Louisiana the action would be barred by prescription. That more than one year expired before the suit in this case was filed and the question is, under the first assignment of error, whether or not the action having been barred by the statute of limitations in the state of Louisiana, the case can be brought after the expiration of one year in the state of Mississippi. The writer of this brief will ask Mr. F. D. Blue, one of the attorneys for the railroad, to present this point.

T. S. Dale, for appellee.

This suit was instituted by appellee, John Fortenberry, who was plaintiff in the court below, in the circuit court of Marion county, in the state of Mississippi, for personal injuries received in the state of Louisiana. The New Orleans Great Northern Railroad Company, appellant, is a railroad company organized both under the laws of the state of Mississippi and the laws of the state of Louisiana, its line of railway passing through said Marion county, in Mississippi. More than one year had expired since plaintiff received his injuries before the institution of his suit. Defendant, the New Orleans Great Northern Railroad Company, filed a special plea to plaintiff's declaration, in which it plead the statute of limitations of the state of Louisiana, and to this plea a demurrer was filed by the plaintiff, which demurrer was sustained by the court. Appellant contends that the sustaining of this demurrer was error.

In submitting these authorities, we do not for one time concede that plaintiff's cause of action would have been barred by the statute of limitations of the state of Louisiana, should the same apply. The statute of limitations of Louisiana is not at all clear as to this, but we think it well settled that in this case the statute of limitations of this state apply, and not that of the state of Louisiana.

We think this question long since settled beyond dispute by the supreme court of this state. See *Schroff* v. *Lisco,* 63 Miss. 213; *Wright* v. *Mordaunt,* 77 Miss. 537.

The case of *Krogg* v. *Atlantic & West Point Railroad Company,* a Georgia case, reported in 77 Ga. 202, 4 Am. St. Rep. 79, is a case very similar to this case, and one in which this very question was raised and settled in favor of plaintiff, appellee herein. Plaintiff Krogg received his injuries in the state of Alabama and instituted his suit for damages in the state of Georgia, the railroad running through both states. Defendant, the Atlanta & West Point Railroad Company, plead the Alabama stat-

ute of limitations. The court held that the statute of limitations of Georgia (the place of the forum) governed, and not that of the other state. The court, in passing upon this question in this case, said: "It is insisted that as this injury arose in Alabama, the period of the statute of limitations is that prescribed by the statute of that state. We do not agree with this view of the counsel for the defendant company; it would seem that at this day it would require neither argument nor authority to settle this point." *Kragg* v. *Atlantic & West Point Railroad Company,* 77 Ga. 202, 4 Am. St. Rep. 79.

Whitfield, McNeil & Whitfield, for appellee.

This suit, based on the above stated facts, is first sought to be avoided by a plea of the appellant company that the suit is barred by the statute of limitations of the state of Louisiana where the accident happened. This contention is manifestly untenable, as is demonstrated by the following Mississippi cases: *Scharff* v. *Lisso,* 63 Miss. 213; *Wright* v. *Mordant,* 77 Miss. 537, and the case of *Groff* v. *Atlanta & West Point Railroad Company,* 77 Ga. 202, all cited in the brief of our associate counsel, Dale, Hennington & Rawla, which authorities are conclusive of the proposition that the *lex fori* governs with respect to statutes of limitation.

In addition to those authorities cited in that brief, from which we will not quote, as they have already been quoted from in brief of associate counsel, we call this court's especial attention, as being conclusive of this proposition, beyond all doubt, to the case of *Louisville & N. R. Co.* v. *Pool,* 16 So. 753. This was a case for damages against the railroad company for cattle killed by its train in another state. The suit was brought in Mississippi and the statute of limitations of the other state was plead as a bar to the recovery. The court ruled that the statute was not applicable.

The court, speaking through Chief Justice COOPER said, referring to section 2754 of the Code of 1892, being 3114

of the Code of 1906: "This section has in view the case of a nonresident protected by the bar of the statute of limitations of the state or country in which he has resided against a cause of action there arising, who afterwards moves into this state. Ordinarily, there will be no difficulty in pleading or applying the statute, for the plea of a natural person that during a certain period of time he was a resident of another state *ex vi termini,* implies that during that time he was a nonresident here. But a corporation may, for many purposes, be resident in many states at one time; and it may be, and probably is, true that the defendant was operating its road both in this state and Alabama when, by the running of its cars in Alabama, it killed the plaintiff's cattle. Strangely enough, there is no evidence of this fact in the record. But we think the plaintiffs case is helped by the plea of the defendant, which fails to aver the fact of nonresidence by it during the period pleaded as a bar. The plea is that the defendant was a resident of Alabama, which may be. *Non constat* that it was not also resident in this state. This *finesse* in pleading cannot avail."

It would seem that the decision settles beyond all controversy the first assignment of error, to wit: that the statute of limitations of the state of Louisiana bars this suit by the appellee in this state. We are so satisfied that there is nothing to this assignment, in view of this and the other decisions of this court and the courts of other states, that we dismiss this assignment without the citation of other authorities.

COOK, J., delivered the opinion of the court.

Appellee sued appellant for personal injuries inflicted upon him by the alleged negligence of appellant's servants in the operation of one of its trains between Slidell, Louisiana, and Jackson, Mississippi, upon which train appellee was a passenger. The jury awarded one thousand dollars as damages, and from the judgment on that verdict this appeal is prosecuted.

It is contended that the cause of action arose in Louisiana, and that the action was barred by the one-year statute of limitations of that state. This defense was set up by proper plea, to which appellee demurred, and his demurrer was sustained. The declaration charges that appellant is a Mississippi corporation, and that its line of railroad begins at a point in this state and terminates at a point in Louisiana, and this is not denied. We think the demurrer was properly sustained, and that section 3114, Code of 1906, has no application. *Railroad Co.* v. *Pool,* 72 Miss. 487, 16 So. 753.

It is further insisted that the peremptory instruction asked by defendant below should have been given by the trial court because the evidence at the trial shows that plaintiff's injury was caused by his own negligence.

We have carefully considered the evidence and cannot say that the court erred in submitting the issue of contributory negligence to the arbitrament of the jury.

Affirmed.

JAMES BOLTON *et al. v.* HENRY T. BOLTON.

[64 South. 967.]

1. WILLS. *Execution. Subscription by witness. Sufficiency.*

Where, when a will was executed, there were present the testator and two witnesses and one of the witnesses signed with the testator and the other witness was about to sign when the testator requested him to take his acknowledgment to the will as he thought that was better, which was accordingly done, the acknowledgment being on a blank, and the will and acknowledgment were folded together and handed the testator who handed it back to one of the witnesses with the request that he take good care of it, the will in such case was sufficiently attested, since it was apparent that the witness took the acknowledgment.

and signed his name to the same for the purpose of showing that he witnessed the execution of the will.

2. SAME.

Where the names of attesting witnesses to a will are on separate sheets of paper from that of the testator, the will is sufficiently attested if these sheets are physically connected, and the same result will follow where the testator, knowing what the signature of the witness was intended to be, handed the two papers, folded together, to one of the witnesses as his completed will.

APPEAL from the chancery court of Quitman county.

HON. M. E. DENTON, Chancellor.

Bill by James Bolton and others against Henry T. Bolton and others to set aside the probate of the will. From a decree sustaining the will, complainants appeal.

The facts are fully stated in the opinion of the court.

E. C. Black, for appellants.

Appellants contend that the acknowledgment which was taken by J. M. Whatley cannot be construed under the law so as to make the said J. M. Whatley an attesting witness with Dr. W. G. Harris to the execution of the will. The paper on its face does not indicate that Whatley was an attesting witness, but rather signed in his official capacity as though he were taking an acknowledgment for a conveyance of land, and this cannot be construed as an attesting witness. *Burton* v. *Brown,* 25 So. 61. In the case above cited, though not indicated in either the statements of the facts or the opinion, yet by an examination of the testimony of the Reverend H. M. Mingo, Senior, it is shown that he signed and intended to sign as a witness and his testimony complied fully with the requirments of the statute in such cases, as is also shown from the testimony of the witness Reverend Thomas Morgan, yet the court held that the Reverend H. M. Mingo, Senior, did not sign as a witness, but as *amanuensis.* The appellants further contend that J. M. Whatley did not sign as an attesting witness under the law,

because he signed upon a separate piece of paper from that upon which the will was written and which said sheet of paper was not, then and there in the presence of the testator, attached to the will, but later after having lain in the safe or office of Dr. W. G. Harris for an indefinite time was attached to the will by the said Dr. Harris at a time when neither the testator nor the said Whatley were present. In Schouler on Wills (2 Ed.), par. 336, it is said that the paper on which the witness signs must be connected at the time. 1 Jaron on the Law of Wills, p. 109.

If we take Whatley's version of the matter it cannot be contended that he signed as a witness for Whatley said: "I started to sign as a witness to the will and W. S. Bolton told me not to sign as a witness but to take his acknowledgment." It is manifest that when J. M. Whatley started to sign as a witness, and was requested not to do so, his office as an attesting witness then and there ceased and he became an officer before whom an insufficient acknowledgment was executed. However, this is in conflict with the testimony of the witness Harris and we contend that this presents a question for the jury.

Appellants insist again that the will is not valid not only because Whatley was not a subscribing witness, but because there were two distinct pieces of paper used in the effort to execute the will which were not connected either by continuity of meaning, or physical connection. We contend that the alleged body of the will and the acknowledgment which was taken by Whatley above referred to are not one and the same instrument, because if considered separately there is no coherence of meaning or continuity of thought and even appellees cannot say these two sheets of paper were physically connected at any time in the presence of the testator and the witnesses which we think is a necessary requisite to the validity of the will. Appellees may rely upon the fact that these two sheets of paper were kept together, but we contend

these papers should have been physically connected at the time and in the same presence of both the testator and the witnesses. *Murray* v. *Murphy,* 39 Miss. 214; 29 A. & E. (1 Ed.), 229; Schouler on Wills (2 Ed.), par. 336; 1 Jarmon on the law of Wills, 109, *et seq.;* 40 Cyc. 1093 and 1094 and notes thereunder. The facts are, these two separate and distinct sheets of paper were carried off by Dr. W. G. Harris and kept in his safe and were physically connected at some indefinite time prior to the effort for probation. Counsel for appellees will doubtless rely upon the announcement in *Murray* v. *Murphy, supra,* but we insist that this case does not decide our contention, that the body of the will and the attestation of a witness must be so connected in the presence of the testator and the attesting witnesses so as to make it one instrument under the law. It may be insisted by counsel for appellees that the clear intent of the testator was carried out, and therefore his will properly executed, but we contend that a strict compliance of the statute must be before there is a valid will, and in the case at bar we respectfully submit that no sueh strict compliance was made. 60 A. S. R. 616; 76 A. S. R. 294. We take it that this safeguard is for the protection of those who wish to dispose of their property and direct the manner and purposes for which it might be used, and a disregard of this strict compliance with the statute would leave wide open the doors of fraud. Schouler on Wills (2 Ed.), par. 336. In the case at bar W. S. Bolton may have intended to will his property as is indicated in the alleged document, but the question is, did he comply with the statute?

We therefore respectfully submit that this case should be reversed and remanded.

Mack & Donaldson, for appellees.

It is contended that the will is not properly witnessed by two subscribing witnesses, as provided by the statute. There is no contention as to the witness Harris,

but appellants say that the attestation of the witness, J. M. Whatley, is insufficient, and cite in support of that contention the case of *Burton* v. *Brown,* 25 So. 61. In reply to this contention by appellants, we say that an acknowledgment is the most solemn form of attestation, and has been so held by the Mississippi supreme court in the case of *Murray* v. *Murphy,* 39 Miss. 214, which case was almost exactly like the one at bar. The only difference in the case at bar and the case of *Murray* v. *Murphy,* being, that at the time of *Murray* v. *Murphy* case, it was necessary to have three witnesses instead of two as is the case now. In the *Murphy case, supra,* one of the three necessary witnesses was a justice of the peace and thinking to lend dignity to his act of attestation, took a formal acknowledgment. The supreme court held the acknowledgment to be mere surplusage and not to in any way impair or detract from the act of attestation, and that an acknowledgment was a most solemn form of attestation and sufficient. In the instant case, it was necessary to have two subscribing witnesses, and one of them being a member of the board of supervisors, and according to his own testimony, thinking and intending to make the act better, stronger and of more solemn and binding effect, he formally took the acknowledgment of the testator. If this was held to be sufficient in the case of *Murray* v. *Murphy, supra,* we can see no valid reason for the court now holding otherwise. And even without the precedent of the case cited, the same logic and the same reasoning would now apply as then, and would inevitably lead to the same result.

As to the other point raised by the brief of appellants, as to whether the acknowledgment being written out on a separate slip of paper, or blank form and not then and there attached before the actual signing by the testator and the witnesses, I have been unable to find any direct precedent among the authorities which I have examined. After all, it would seem to resolve itself into a matter of

intent of the parties, and in the absence of any fraud or even allegation or intimation of fraud, would seem to have very little weight or bearing on the case. I can conceive, had there been any proof of fraud on the part of the custodian of the will, there might be some ground for submitting to the jury the question whether or not the acknowledgment was a part of the will, or whether the slip which is now attached and forms a part of the instrument was originally intended to be, and was in fact a part of the will. But there is no contention that it was not intended so to be, and no proof was offered by contestants even tending to show a different state of facts, and there being no conflict as to the testimony on this point, the peremptory instruction in so far as this point was concerned was correct. All the proof shows that the acknowledgment was written out and signed in the presence of the testator and in the presence of the other witness, and though the testimony is somewhat in conflict as to whether any attempt was made to physically attach it to the will at that time, Dr. Harris testifying that he did try to paste the two papers together, but the paste available at the home of the testator being poor, he repasted them when he reached his office, while J. M. Whatley's recollection of the transaction was that the two pieces of paper were merely folded together and delivered to Dr. Harris, yet the proof does show clearly that the paper on which was written the acknowledgment was at least placed with the will at the time and as a part thereof, folded up with it and carried by Dr. Harris, the custodian of the will and placed in his office safe until carried to the office of the chancery clerk to be offered for probate, never being separated and always kept together as parts of the same instrument. There is no conflict in the proof as to this, and consequently no question for the jury to decide.

It is contended that there is a conflict in the testimony of Dr. Harris and J. M. Whatley sufficient to have

caused a question for the jury as to whether the witnesses knew how many subscribing witnesses were necesary to a will. If there is any conflict as to this point, it is certainly immaterial, and it made no difference whether the witnesses knew the law or not so long as they stumbled into a compliance with its mandates, and there was no question in that for a jury to decide.

We therefore submit that no question was raised by the proof for submission to a jury and the court below was within its province in granting the peremptory instruction.

SMITH, C. J., delivered the opinion of the court.

Appellants filed their bill in the court below to set aside the probate of the will of their brother, W. S. Bolton, and issue *devisavit vel non* was made up, and at the close of the evidence the court peremptorily charged the jury to find, "that the writing propounded is the last will and testament of W. S. Bolton, deceased," and there was a verdict and decree accordingly. The objection here urged to the will is that it is attested only by one witness.

When the will was executed there were present the testator, Dr. W. T. Harris, and Mr. J. M. Whatley, a member of the board of supervisors of Quitman county. Dr. Harris wrote the will and signed his name thereto as an attesting witness. Mr. Whatley, who was present by request, was about to sign his name thereto also as an attesting witness, when the testator said to him: "I would rather you take my acknowledgment to it, because I think it is better." Dr. Harris then commenced to write an acknowledgment at the end of the will, whereupon Whatley took from his pocket a blank printed acknowledgment, took the testator's acknowledgment, filled out and signed the blank, and handed it to Dr. Harris, who handed it, folded together with the will, to the testator, who handed them back to Dr. Harris, with the request that he put it in his pocket and take good care of it. Thus far, there is no conflict in the testimony.

According to Whatley, the acknowledgment was not physically connected with the will. According to Dr. Harris, he made an effort when the acknowledgment was handed to him to paste it to the will; but, the paste being defective, he failed so to do. He afterwards, however, attached it to the will with mucilage.

The contention of appellants is that Whatley cannot be held to be an attesting witness for the reasons: First, that he did not sign the will for that purpose; and, second, that his signature is on a sheet of paper not physically connected with the one on which the signature of the testator appears.

This will was signed by the testator in the presence of Whatley, and there can be no question that his taking the acknowledgment and attaching his signature thereto, was for the purpose of evidencing the fact that he had witnessed the execution of the will by the testator.

It is not necessary for the signature of the attesting witness to be on the same sheet with the signature of the testator. All that is necessary is that such witness shall attest the will. All of the authorities which have come under our observation hold that, where the names of attesting witnesses are on a separate sheet from that of the testator, the will is sufficiently attested if these sheets are physically connected. If Dr. Harris therefore had pasted these sheets together at the time the will was executed, there can be no doubt, under the authorities, that the attestation of Whatley would have been sufficient. It seems to us that the same result must follow when the testator himself, knowing what Whatley's signature was intended to be, handed the two papers to Harris, folded together, as his completed will.

Affirmed.

W. A. BURKHALTER *v.* MITCHELL AND MCLENDON.

[64 Miss.. 967.]

1. SALES. *Conditional sales. Agreements constituting. Validity.*
Where plaintiffs furnished the money to defendant with which to purchase a mule and took defendant's note for the amount of the loan with interest, the note reciting that the title to the mule remained in the plaintiffs until the note was paid, the mule was the property of the plaintiffs and they were entitled to take possession of it upon default in the payment of the note.

2. SAME.
Contracts of this kind are enforced even against innocent purchasers for value without notice, where there is a *bona fide* and actual conditional sale.

APPEAL from the circuit court of Tallahatchie county.
HON. N. A. TAYLOR, Judge.

Suit of replevin by Mitchell and McLendon against W. A. Burkhalter. From a judgment for plaintiffs, defendant appeals.

The facts are fully stated in the opinion of the court.

R. L. Cannon, for appellant.

The testimony of every witness in the case conclusively shows that at the time Mitchell, appellee, attempted to retain title to the mule, he had no title. The testimony further shows conclusively that up to the day of trial, Mitchell had never, by purchase or otherwise, acquired any sort of title to the mule. The plaintiff Mitchell himself, summing up in answer to a question on cross-examination, makes this significant statement: "I said the transaction was made entirely in all its details between W. A. Burkhalter and Pleas Burkhalter; I had no part in it."

We ask again, how could Mitchell, by the mere flourish of a pen, retain a title he did not hold? The prior

vesting of title in him was the essential foundation without which any attempt to retain title was utterly void, and of no effect. We think this question has already been settled in this court by the case of *Parker* v. *Payne*, 95 Miss. 375, 48 So. 835.

In the Parker case, an appeal from a judgment in an action of replevin, in which the facts were very similar to the facts in the instant case, and in which the same question now under discussion was involved, FLETCHER, J., rendering the opinion of the court says: "In order for the seller to enforce his claim, he must be in fact the owner of the property, and make a *bona fide* sale thereof to a *bona fide* purchaser, by which sale the actual possession of the property shall be in truth changed."

We submit that, not only did the court commit reversible error in granting each instruction given plaintiff and in refusing defendants instruction number 2, but that it should have given the peremptory instruction requested by defendant. We submit that appellee has no standing in an action of replevin; that the judgment of the lower court should be reversed; and that judgment should be entered in this court for appellant. If we are mistaken as to the extent of the judgment to be rendered by this court, then, at least, the cause should be remanded to be tried on instructions properly presenting the issues as to plaintiff's title.

Dinkins & Caldwell, for appellee.

Counsel for appellant assumes that there is nothing in the record to show that either title or possession of the mule was ever actually in the appellee, the plaintiff in the court below, but the appellant had full authority to place the title in any person whom he wished, and this he did by his voluntary contract duly executed.

Our contention is, and the facts fully warrant it, that appellee furnished the money to purchase this mule for the appellant, who agreed that the title should be and

remain in the appellee until the purchase price was fully paid, and whether the mule was originally purchased from the appellee or some one else, the fact remains that the appellee furnished the money with which to make the purchase and the appellant agree that the title should vest and remain in appellee until this purchase price should be fully paid.

We, of course, recognize the law, as between an innocent third party and original parties to be different to that as between original parties to a contract. We know of no authority, nor has counsel produced any, that will permit a party to a contract, who acknowledges title of property to be in another, to deny such title when asserted against him. This question was not at all involved in the Parker case and we do not think it can be used as authority in the case at bar.

There are two principles which we wish to invoke and which we think will settle this case conclusively in favor of appellee. The principle that is elementary in its nature, that the terms of a written instrument cannot be varied by parol testimony as was stated by Judge CAMPBELL in *Cocke* v. *Blackbourn,* 58 Miss. 537, and approved by COOPER, C. J., in *Baum* v. *Lynn,* 72 Miss. 932: "Where parties embody their mutual agreements in a formal written instrument, it must be taken as containing all they then desire to preserve the evidence of and that it is not competent, afterwards, in a trial at law, to add to or substract anything from it, by parol evidence of something which it should have contained or omitted." *Milburn Gin Co.* v. *Ringold,* 19 So. 673.

It is not the province of courts to make contracts for parties who act *sui generis,* but will compel parties litigant, (adding to counsel for appellant's expression) "to stand hitched to the post whereto in former times they hitched themselves."

COOK, J., delivered the opinion of the court.

This is an action of replevin instituted by appellees against appellant to recover possession of a mule. There was a verdict and judgment for plaintiffs in replevin, and defendant appeals.

On the 7th day of February, 1908, appellant, W. A. Burkhalter, who was a customer of Mitchell & McLendon, merchants doing business at Enid, applied to them for money with which to purchase a mule, stating the price at which one could be obtained from his cousin, Pleas Burkhalter; Mitchell, acting for the firm, agreed to let him have one hundred twenty dollars with which to purchase the mule, and prepared and appellant signed a note for one hundred thirty-two dollars to cover the principal and interest, in which note the title to the mule was retained, whereupon Mitchell issued a check, probably payable to the appellant, for the one hundred twenty dollars, which he, appellant, delivered to Pleas Gurkhalter and received the mule. The note was in words, etc., as follows: "$132.00. Enid, Miss., 2/7/1908. Nov. 1st after date I promise to pay to Mitchell & McLendon at Grenada Bank, Grenada, Miss., one hundred thirty-two and no/100 dollars, with ten per cent. interest per annum from maturity till paid. If this note is placed in the hands of an attorney for collection, the makers and endorsers hereof agree to pay the holder hereof an attorney's fee of ten per cent. upon the amount due, demand, protest and notice waived, for one mouse-colored mule, three years old, title remaining in Mitchell & McLendon until this note is paid. W. A. Burkhalter."

It is contended by appellant that the relationship between appellant and appellees was that of debtor and creditor, and at most the note created an equitable mortgage, which could only be enforced by resort to a bill in equity for the foreclosure of same, and in no event was appellee entitled to the possession of the mule.

Payne v. *Parker,* 95 Miss. 395, 48 So. 838, is cited to sustain this contention. In this case the alleged conditional sale rested in parol, and the contest was not between the alleged conditional seller and conditional buyer of the property in controversy, but between the alleged seller, or owner, and the trustee of a deed of trust executed to secure a *bona fide* indebtedness of the alleged purchaser of the property. Neither the *cestui que* trust nor the trustee had any notice of the conditional sale. This court merely held that as between the trustee and the alleged conditional seller the alleged sale and retention of title was at most a mortgage of which the trustee had no notice, actual or constructive.

In the instant case the contest is between the maker and the payee of the note, which upon its face shows that the money the maker promised to pay was the purchase price of the mule in controversy, and that the title to same should remain in the payees until the note was paid. It is the settled law of this state that contracts of this kind are enforceable even against innocent purchasers for value without notice, where there is a *bona fide* and actual conditional sale.

The parties to this contract agreed to treat the transaction as a conditional sale, and for the purposes of the contract the mule was the property of the payee, and in case the promisor did not pay the borrowed money when due, it was the understanding that the firm advancing the money would have the right to take possession of the mule and enforce the payment of the money remaining unpaid.

We know of no rule of law, or principle of public policy forbidding this sort of contract, and we can see no reason why it should not be valid and binding on the parties thereto. Indeed, it seems to us that good faith and good morals demand that the agreement between the parties should be enforced by the courts.

Affirmed.

St. Louis & S. F. R. Co. v. Elisha Bowles.

[64 South. 968.]

Appeal and Error. *Findings. Conclusiveness.*

The supreme court will not set aside the verdict of a jury, finding the facts of a case, merely because it is of the opinion that the verdict was contrary to what that court deemed the weight of evidence.

Appeal from the circuit court of Marshall county.

Hon. H. E. Mahon, Judge.

Suit by Elisha Bowles, by next friend, against the St. Louis and San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals.

Appellee (plaintiff below), a negro boy, by his father and next friend, brought an action against the appellant for damages for injuries received by him while in appellant's employ. The declaration alleges that plaintiff was a minor seventeen or eighteen years old at the time of the injury and was engaged in unloading cross-ties from a box car on a side track of appellant railroad; that in removing ties from the end of the car, an unfilled space was left in the middle of the car, and that while plaintiff was standing in the car unloading ties under the direction of appellant's foreman, the car was struck violently by moving cars of appellant making a flying switch, and the cross-ties were thrown together in the space where plaintiff was at work, and broke his leg in two places, injured his back, knocked out several teeth, and otherwise injured him, rendering him unconscious from the injuries. He was taken to a hospital in Memphis, Tennessee, about thirty or forty miles distant, and remained there for treatment for some time, suffering greatly, and being given frequent doses of morphine and other narcotic drugs. The defense relied upon is that plaintiff was

more than twenty-one years of age, had given a written release to the claim agent of appellant in consideration of two hundred seventy-five dollars, as full settlement of his claim against the railroad. The defendant introduced testimony to show that plaintiff while in the hospital had made affidavit that he was twenty-one years of age, and that he was represented at the settlement by a negro lawyer of Memphis, and that a cousin of his was also present when the settlement was made. Plaintiff denies any knowledge of making the affidavit, or of making the settlement, and denies that he ever employed any attorney to act for him, and if such a transaction occurred, he was out of his head at the time and knew nothing of it. There was a conflict in the testimony, and the case went to a jury under instructions of the court, and the jury returned a verdict for two thousand dollars, less the sum of two hundred seventy-five dollars previously paid. The railroad company appeals.

Smith & Totten, attorneys for appellant.

W. A. McDonald and *J. W. Buchanan,* attorneys for appellee.

COON, J., delivered the opinion of the court.

We are asked to reverse this case because the verdict of the jury is contrary to the overwhelming preponderance of the evidence. A careful review of the evidence fails to convince us that the weight of credible evidence rests with appellant, and, besides, we do not believe it to be the province of this court to set aside the verdict of a jury, finding the facts of the case, merely because we should be of opinion that the verdict was contrary to what we deemed the weight of evidence. In the instant case it is not difficult to find ample reasons for the jury's refusal to believe the testimony offered on behalf of appellant.

Affirmed.

W. H. WILLIAMS v. SOUTHERN RY. CO.

[64 South. 969.]

CARRIERS. *Action for wrongful ejection. Exemplary damages.*

Where plaintiff owned a railroad mileage book and there was a stipulation on the back of the book under the heading "Instructions to Conductors" that, "Any ticket issued by an agent in exchange for coupons detached from the ticket will be honored only when presented in connection with this ticket. Holder must identify himself as the original purchaser of this ticket to your entire satisfaction." And a further stipulation that a passenger should exchange the mileage for a ticket, and in exchanging the mileage remaining in the book for a ticket, the book was retained by the ticket agent of defendant, who did not explain that its production with the ticket was necessary, and plaintiff had never before been called upon to produce the book and did not know its production was necessary, and the train auditor refused to accept the ticket from plaintiff without the book, and ejected plaintiff from the train, although the facts were explained to him and plaintiff was identified to the satisfaction of the conductor. In such case the conduct of the auditor was arbitrary, willful, and oppressive, evincing an utter disregard of plaintiff's rights and made a proper case for the infliction of exemplary damages.

APPEAL from the circuit court of Alcorn county.

HON. J. H. MITCHELL, Judge.

Suit by W. A. Williams against the Southern Railway Company. From a judgment for plaintiff for an insufficient amount, plaintiff appeals.

The facts are fully stated in the opinion of the court.

E. C. Sharp and *Thos. H. Johnston,* for appellant.

The only question presented by the record in this case for the consideration of the court, is whether or not, under the facts of this case, which are undisputed, a case was presented in which punitive damages might properly

have been awarded. If so, the trial court erred in giving instruction number 4 at the request of appellee; and in refusing to give the instruction number 3, as requested by appellant.

The undisputed evidence in this case shows, that appellant was the owner of a certain interchangeable mileage book, the coupons of which were good for an exchange mileage ticket, mile for mile, over appelee's road; that appellant exchanged his mileage at Tuscumbia, Alabama, for a ticket to Corinth, Mississippi. This exhausted the mileage in his book, as the distance from Tuscumbia to Corinth, fifty-two miles, was exactly the number of coupons left in his book. The agent at Tuscumbia pulled this mileage and issued and handed the appellant an interchangeable mileage ticket good on its face for transportation from Tuscumbia to Corinth, but retained the mileage book cover, not giving the same to appellant when he handed him the ticket. Appellant not knowing at the time that it was necessary for him to have the mileage book cover to make his exchange ticket good on appellee's train, although one of the numerous provisions on the mileage book cover provided that such was the case, did not request a return of the mileage book cover, nor did he demand the same of the agent, for the reason, as he says, that he did not know that it was necessary, as he had never been called upon before to show his mileage book when riding on such a ticket.

When the auditor came through the train taking up tickets, appellant tendered him his mileage exchange ticket, the auditor demanded to see his mileage book cover; when appellant explained to him the circumstances, and told him that the ticket agent at Tuscumbia had kept the cover of his mileage book, the auditor handed the ticket back to him, and told him that he would have him put off the train.

Appellant's explanation, without more, was a reasonable one, and the ticket which he held, reading from Tus-

cumbia to Corinth, with the day of that date on the back of the same, was a mute but powerful witness of the truth of appellant's explanation, and it was the duty of the auditor to have accepted such explanation, and to have treated appellant as a passenger, until he ascertained the truth or falsity of such statements. *Hufford* v. *Grand Rapids R. R. Co.* (Mich.), 8 Am. St. Rep. 859; *Georgia R. R. & Banking Co.* v. *Dougherty,* 22 Am. St. Rep. 499; *K. C. M. B. R. R. Co.* v. *Riley,* 68 Miss. 765; *Railroad Company* v. *Holmes,* 75 Miss. 371; *Railroad Company* v. *Harper,* 83 Miss. 560; *Smith* v. *Railroad Company,* 85 Miss. 349; *I. C. R. R. Co.* v. *Gortikov,* 90 Miss. 787; *I. C. R. R. Co.* v. *Reid,* 93 Miss. 458.

Lamb & Warriner, for appellee.

The only question presented to the court, is whether or not, the appellant is entitled to recover punitive damages in this case. The trial court held that he was not entitled to recover punitive damages, and in this we think he was correct.

There is no fixed rule governing the recovery of punitive damages, but each case must stand or fall on the facts surrounding the particular case. *R. R. Co.* v. *Hardie,* 100 Miss. 154.

"The theory of the law authorizing imposition of punitive damages is wholly outside of individual consideration. Such damage is allowed for the public good and for the purpose of detering others from like offenses. Such damage is allowed in cases of malice, willfulness, insult, fraud, oppression, gross negligence and the like." *R. R. Co.* v. *Hardie,* 100 Miss. 146.

We submit to the court that the rule laid down above being the guide in such matters, we do not think there can be any question about the ruling of the lower court being correct.

Where there is no testimony warranting the submission of the question of punitive damages to the jury, the

court should refuse all instructions on that line. *Railroad Co.* v. *Hardie,* 100 Miss. 166; *Railroad Co.* v. *Smith,* 82 Miss. 656; *Railroad Co.* v. *Scurr,* 59 Miss. 456. The only testimony offered in this case was that of the appellant himself, so there is no dispute about the facts of the case.

The cause of appellant's contention in this case was brought about by his own neglect, which was substantially as follows: The appellant owned an interchangeable mileage book, and the contract under which these mileage books are sold, so stipulates that the mileage contained in these books can be exchanged for tickets at the stations or on the line of railway and the tickets will be good on the train when accompanied with the mileage book which had been given in exchange for the tickets.

The appellant desired to come from Tuscumbia, Alabama, to Corinth, Mississippi, and had just enough mileage to exchange for a ticket to Corinth. Either by his own fault, or the fault of the agent at Tuscumbia, the appellant left the cover of his mileage book, all the mileage having been used in procuring his ticket, at Tuscumbia, and boarded the train without having the cover of his mileage book. When called on for his ticket he tendered the same to the conductor or auditor; when he was asked to show his mileage book and not being able to do so, he was put off of the train, as his ticket was not good without the mileage cover book and he refused to pay his fare.

He does not claim in his testimony that there was any insult or anything out of the ordinary.

We respectfully submit to the court that the appellant is not entitled to recover the amount of fifty dollars which he got judgment for and we do not think that he ought to complain for not receiving more.

REED, J., delivered the opinion of the court.

The refusal by the trial court to grant appellant an instruction authorizing the jury to assess punitive dam-

ages is assigned as error in this case. This is the sole question for our consideration in this appeal.

Appellant owned an interchangeable mileage book. He desired to go from Tuscumbia, Alabama, to Corinth, Mississippi. The coupons remianing in his book were fifty-two miles, the distance between the two cities. Complying with the requirements of appellee company, he exchanged his mileage for a ticket. When the agent issued the ticket, he kept the mileage book cover, as all the coupons had been used.

There is a stipulation on the back of the mileage book, under the heading, "Instructions to Conductors," which is: "Any ticket issued by an agent in exchange for coupons detached from this ticket will be honored only when presented in connection with this ticket. Holder must identify himself or herself as the original purchaser of this ticket to your entire satisfaction." Appellant did not know that it was necessary for him to have the mileage book cover to present to the conductor with his exchange ticket. He states that he had never been called upon to present the book in connection with an exchange ticket.

Shortly after the train, on which appellant had taken passage, left Tuscumbia, a train auditor came to him for his ticket. When he presented the ticket, the auditor demanded the mileage book. Thereupon appellant explained to the auditor that the agent of appellee company at Tuscumbia had retained the book cover when the exchange ticket was issued; that all coupons had been used therefrom. The auditor would not accept the ticket, and said that he would put appellant off the train.

Appellant was recognized by a friend, who spoke to the conductor about the matter. The conductor was willing to accept the friend's statement that appellant "was all right," and said, "If you know Mr. Williams is all right, I know you, and we will proceed." The auditor would not agree to this, and said, "No; we will put him off."

At Cherokee, Alabama, the train was stopped, and the auditor and conductor took appellant by the arms and put him off the train. No insulting language was used. The jury returned a verdict in favor of appellant for fifty dollars.

It will be seen that the train officer would not accept the excuse offered by appellant for failure to produce the mileage book cover. Appellant's explanation was reasonable. He had a ticket duly issued to him by appellee company. He had used such tickets before, and had never been asked to exhibit his mileage book. He did not understand the stipulation on the back of the book requiring it to be presented in connection with an exchange ticket. He was then and there identified with such reasonable certainty as should have been to the entire satisfaction of the auditor. In addition to all this, the mileage book cover was taken from appellant by an agent of appellee company, who gave appellant no notice that another agent of the company would likely demand an exhibition thereof. When appellant was forcibly ejected from appellee's train by two of its agents for the failure to have in his possession and produce the mileage book cover, this very thing was in the possession of appellee.

The facts in this case are not controverted. The only testimony is that given by appellant. The auditor's conduct in refusing to accept the reasonable explanation made by appellant was arbitrary, willful, and oppressive. He evinced an entire disregard of appellants rights. The evidence shows this to be a proper case for punitive damages. *Railroad Co.* v. *Holmes,* 75 Miss. 371, 23 So. 187; *I. C. R. R.* v. *Harper,* 83 Miss. 570, 35 So. 764, 64 L. R. A. 283, 102 Am. St. Rep. 469; *I. C. R. R.* v. *Gortikov,* 90 Miss. 787, 45 So. 363, 14 L. R. A. (N. S.), 464, 122 Am. St. Rep. 324; *I. C. R. R.* v. *Reid,* 93 Miss. 458, 46 So. 146, 17 L. R. A. (N. S.), 344.

Reversed and remanded.

MERCHANTS AND FARMERS BANK v. W. T. SMITH.

[64 South. 970.]

1. EVIDENCE. *Parol evidence. Bills and notes. Defenses. Corporations. Actions. Pleading. Trial. Amendment.*

In a suit on a promissory note where there are no contractual provisions in the note relative to its consideration, parol evidence is admissible to show a failure of consideration.

2. CORPORATIONS. *Actions. Pleading.*

In a suit on a promissory note for the purchase price of corporate stock, where the plea of the maker of the note sets up a breach by the payee, a bank, of its agreement to furnish the corporation with sufficient capital to carry on business, and that because of such breach the stock becomes worthless, it was not material for the plea to deny the reception of the money represented by the note, by the maker.

3. PLEADING. *Amendment. Trial.*

It is proper for the court to allow defendant to amend his plea after the evidence was introduced where such amendment in no way prejudiced plaintiff's cause.

APPEAL from the circuit court of Union county.

HON. H. K. MAHON, Judge.

Suit by Merchants & Farmers Bank against W. T. Smith. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Jones & Knox and *C. A. Bratton,* attorneys for appellant.

H. D. Stephens and *R. H. & J. H. Thompson,* attorneys for appellee.

Argued orally by *C. A. Bratton,* for appellant, and *R. H. Thompson,* for appellee.

REED, J., delivered the opinion of the court.

This is an action on a promissory note made by appellee, payable to appellant, and being for two thousand dollars, with interest from date, and attorneys fees. The note was given in the purchase by appellant of preferred stock in the New Albany Clothing Manufacturing Company to the amount of two thousand dollars.

Appellee filed the plea of general issue to the declaration. He also filed a special plea, which we quote in full: "Defendant, W. T. Smith, for further and special plea in this behalf says that the plaintiff should not have and recover from him in this action, because he says that at the time of the execution of said note, and as an inducement for defendant to sign the same, it was agreed by and between plaintiff or its authorized agents and this defendant that if defendant would subscribe for stock in the New Albany Clothing Manufacturing Company that plaintiff would advance him the money to pay for the said stock, and that in order that said company might continue in business that plaintiff would advance and furnish money to defray the operating expenses of said company, and defendant refused to sign said note until it was definitely and finally understood that said bank, for the purpose of paying the operating expenses aforesaid, would advance to the company eighty per cent. of the face value of the accepted credit invoices given for goods sold by the company to its customers. All the aforesaid was understood and agreed upon and constituted the true consideration of this note; but defendant avers that plaintiff failed and refused to carry out its part of said agreement, on account of which failure and refusal the said company was forced to cease business, and the said stock became, and is now, wholly worthless, and that said conduct in refusing to so advance money constituted a complete failure of the consideration of said note."

A demurrer was filed to this plea, and the following causes assigned:

"(1) Because said plea seeks to vary the terms of the written contract by parol evidence.

"(2) Because the written contract sued on expresses the real agreement between the parties, and cannot be varied by parol.

"(3) Because said plea seeks to set up a breach of the verbal contract to vary the terms of the written contract sued on.

"(4) Because said plea does not show that defendant did not receive from plaintiff the amount of money mentioned in said note sued on."

The trial court did not err in overruling the demurrer. None of the grounds are well taken.

The plea does not seek to vary the terms of the written contract, the note, by parol evidence. There are no contractual provisions in the note relative to its consideration. The plea presents the defense of failure of consideration. Parol evidence is admissible in such inquiry.

The plea is not based upon the appellant's failure to pay the amount named, but on its failure to carry out its agreement. It was not material for the plea to deny the reception of the money.

The court's action in permitting appellee to amend his special plea after the evidence was introduced by inserting the word "accepted" before the words "credit invoices" is assigned as error. It was proper for the court to allow this amendment. It in no way prejudiced appellant's cause.

There is sufficient evidence to sustain the verdict of the jury in favor of appellee, and we find no error in the record for reversal.

Affirmed.

AMERICAN LAUNDRY MACHINE CO. *v.* CITIZENS NAT. LIFE INS. CO. *et al.*

[65 South. 113.]

FIXTURES *Machinery. Rights of mortgagees.*

Where the machinery of a laundry attached by screws, rods, and bolts to the floor or ceiling of a building, or to concrete or brick foundation, in order to support and steady it, and which was placed in the building solely for use in connection with the laundry business, none of such machinery being necessary for the use of the building, as each and all of it can be removed without injury to the building, such machinery was personal property, and not fixtures in the sense that they became a part of the building in which they were placed and in such case a mortgagee of the house and lot in which the machinery was placed had no claim on such machinery as against a subsequent mortgage of the same.

APPEAL from the chancery court of Alcorn county.

HON. I. Q. ROBINS, Chancellor.

Suit by American Laundry Machine Company, against the Citizens National Life Insurance Company and others. From a decree for insufficient relief, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Chandler & Chandler and *J. M. Boon,* for appellant.

The appellant relies upon the principals of law as established in the following cases, to wit: *Weathersby* v. *Sleeper,* 42 Miss. 732; *John Van Range Co.* v. *Allen,* 7 So. Rep. 499; *Boone* v. *Mendenhall Lbr. Co.,* 97 Miss. 554, which cases, so far as we can find, are not in conflict with any other decisions of our court.

In the case of *Allen* v. *John Van Range Co., supra,* in 7th Southern Reporter, the stove in the controversy was fastened to the floor, evidently for the purpose of holding it steady, just as the machinery above mentioned was

fastened to the floor or ceiling to hold it steady and keep it from turning over, and Judge WOOD in the *Allen case* says that in the absence of any agreement, the court was unable to see any plausibility in the contention that the property was a fixture, that it would be time enough to revise the former rulings on this subject when an attorney of that court could be found to assert that a cooking stove partakes of the nature of real estate, even though it is fastened to the floor. Now, this kitchen stove was fastened to the floor of the hotel for the purpose of being used in connection with the running of the hotel, and was an essential piece of machinery to be used in operating a hotel—indeed, the hotel would not have been run without the stove—and while it may be conceded that this machinery involved in this litigation was necessary in the operation of the laundry, it was no more a part of the realty than the stove was a part of the hotel building, even conceding that the laundry could not have been operated without such machinery.

There is nothing in the placing of this machinery for use in the operation of the laundry that indicated that it should be considered a permanent attachment to the realty in order to increase the value of the realty, only so long as the laundry would be operated in the building. The building could be used for merchandise, or any other kind of manufacturing plant, or trade or business as well as for a laundry business.

The *Weathersby case, supra,* states that the intention of the parties in making the attachment can be looked to in arriving at whether or not it was intended to be permanent attachment, converting the chattel into a fixture. Let us look at the dealings between these parties with this property, in order to ascertain, if possible, the intention of Mr. Collier in making the attachment, and the understanding of the Life Insurance Company in taking the trust deed. (1) At the time this trust deed was taken by the Life Insurance Company, there was then a trust deed

on a part of this machinery of record in the office of the chancery of Alcorn county, Mississippi; (2) The appraisers in appraising the property for the loan from the Life Insurance Company did not list this machinery nor appraise the same. (3) The trust deed from Collier and wife to the Citizens Life Insurance Company did not describe this machinery; (4) The trustee's deed from Key, trustee, to the Life Insurance Company, the defendant, did not describe this machinery; (5) Mr. Collier attempted to increase his loan with the defendant Life Insurance Company with this machinery as security, which the said defendant declined, because the defendant did not loan money with machinery as security, therefor this last point is clearly established by Mr. Collier in his testimony in this case, and it is admitted by Mr. L. W. Key, the agent of the defendant Life Insurance Company who negotiated this loan for the Life Insurance Company—the only difference being about the time the application was made, Collier thinking that it was immediately upon closing the loan on the real estate, and Mr. Key contending that it was several weeks thereafter by correspondence.

The above clearly shows that Collier dealt with this machinery as separate and apart from the realty, and that Mr. Key, the agent and trustee for the defendant Life Insurance Company, did not understand that he had a trust deed on the machinery, as he distinctly says that he would not loan money upon machinery as security.

We, therefore, respectfully contend that the decree of the chancellor should be reversed and the appellant's lien on the property hereinabove described declared to be good as against the conveyances of the realty, and that said property did not pass to the purchaser of the realty.

W. J. Lamb, for appellee.

The sole question in this case is, whether or not certain articles of machinery were fixtures. The chancellor held them to be fixtures and that the Citizens National

Life Insurance Company were entitled to them because they were fixtures, and decreed them to be the property of the insurance company.

The rule of law adopted by this court is that if there is any testimony to support the findings of the chancellor, his findings will be sustained by this court. The findings of the chancellor on this point were predicated on the testimony of Mr. Collier, the vendor, in this case and one of the parties to this suit.

Another rule of law adopted by this court is, that in passing on the question, whether certain articles become fixtures or not, the presumption is against the vendor and in favor of the vendee. Taking the testimony of Collier and applying the principal of law governing in this case, it is easily seen that the findings of the chancellor are correct.

SMITH, C. J., delivered the opinion of the court.

It appears from the evidence in this case, in which there is no conflict, that Mr. J. H. Collier was the owner of the building situated in the town of Corinth, Miss., in which he had installed and was operating a laundry plant. On September 9, 1907, he executed to appellee a deed of trust on the lot upon which the building in which this machinery had been installed was situated, to secure the payment of a loan of money made him by appellee. After this loan had been agreed upon and before the note evidencing the deed of trust securing it had been executed, Collier requested appellee to increase the amount thereof, offering to include in the deed of trust this machinery as security therefor. This request was declined by appellee on the ground that it "did not make loans on laundry machinery." On January 12, 1908, Collier executed a deed of trust, and on October 9, 1909, a chattel mortgage to appellant upon the machinery situated in this building to secure it in the payment of a sum of money due it by him. The indebtedness secured by these last two in-

struments was incurred by Collier in purchasing from appellant a part of the machinery with which he was conducting his laundry business. Afterwards appellee's deed of trust was foreclosed and the property therein described was purchased by it at the trustee's sale. Under the deed executed to it by the trustee in its deed of trust, appellant claims not only the land, but the machinery situated in the building thereon, on the theory that the various pieces of machinery are fixtures, and therefore title thereto passed to it along with the land. Appellant filed its bill in the court below making all proper parties defendant and praying that Collier be decreed to pay the amount due it, and in default thereof that these deeds of trust be foreclosed, and that appellee's claim to the machinery be canceled and held for naught. The court below ordered that the deeds of trust be foreclosed and canceled appellee's claim to all of the machinery except one band starcher, one engine and boiler, one twenty-six-inch extractor, one detached counter, two cuff presses, one neckband press, one yoke press, one air pump, one No. 3 root blower. Each of the three parties defendant were taxed with one-third of the costs. The engine, boiler, and extractor were placed on concrete and brick foundations attached thereto by rods and bolts; it being necessary so to do in order that they might be properly supported and kept steady. The other pieces of machinery were screwed and bolted either to the floor or ceiling in order to hold them in their places and keep them steady. None of this machinery is necessary for the use of the building as such, and all of it can be removed without injury to the building.

Under the rule announced in *Weathersby* v. *Sleeper,* 42 Miss. 732, and applied in *Boone* v. *Mendenhall Lumber Co.,* 97 Miss. 554, 52 So. 584, it seems clear that the pieces of machinery in question are not fixtures in the sense that they became a part of the building in which they were placed, but that, on the contrary, they were placed in the

building solely for the purpose of being used in connection with Collier's laundry business and remained and still are personal property.

The decree of the court below will be reversed, and decree here as rendered in the court below, except that the claim of appellee to all of the machinery, included in appellant's bill, will be canceled, and except that appellee will be taxed with two-thirds of the cost below, and J. H. Collier, one of the defendants, will be taxed as was done in the court below with one-third thereof. Appellee to pay all costs in this court.

Reversed.

MRS. LOTTIE HAMBLIN v. JOHN HAMBLIN.

[65 South. 113.]

DIVORCE. *Alimony. Issues. Adjudication.*

Where a husband is cited for contempt in failing to comply with an order of the court requiring payment of alimony *pendente lite* and defended on the ground of financial inability to comply with the order, and the judgment against him for contempt recited that the chancellor was fully advised as to all matters and things pertaining to the proceeding, and being so advised, determined that defendant was in contempt, such a judgment necessarily found that he was able to comply with the decree.

APPEAL from the chancery court of Union county.

HON. I. Q. ROBINS, Chancellor.

Proceedings by Mrs. Lottie Hamblin against John Hamblin for contempt in failing to comply with order of the court to pay alimony *pendente lite*. From a judgment against defendant, he appeals.

The facts are fully stated in the opinion of the court.

H. D. Stephens, and *R. H. & J. H. Thompson,* for appellants.

Inability to comply with an order of court is a good defense to a charge of contempt of court in failing to obey such order, unless it appears that the person charged has voluntarily and contumaciously brought the disability upon himself. *State ex rel.* v. *District Court,* 37 Mont. 485, 15 Am. & Eng. Ann. Case, 941, and note on page 943; *McHenry* v. *State,* 91 Miss. 831, 16 L. R. A. (N. S.) 1062; *Galland* v. *Galland,* 44 Cal. 475, 13 Am. Rep. 167.

Inability to comply with an order directing the payment of alimony, is an answer to a rule to enforce it, and when made to appear, discharges the obligation. *Pain* v. *Pain,* 80 N. C. 3224.

The attachment is designed to enforce compliance with the order, and not to punish for being unable to perform it. *Ormsby* v. *Ormsby,* 1 Phila. 578. In such a proceeding the defendant may appear and purge himself of contempt, by showing pecuniary inability, or any other fact which may properly produce a like effect. *Lockbridge* v. *Lockbridge,* 3 Dana 28, 28 Am. Dec. 52.

Where the neglect or refusal is not from mere contumacy, but for the want of means, the result of misfortune, those entitled to payment must resort to other modes of procedure than imprisonment to collect their dues; they may have execution or other final process; may sequester defendant's goods and chattels, rights and credits, lands and tenements The answer of the old man disclosed lands and personalty that could have been subjected to the decree, but the wife was already enjoying all of his property and she and her sons had taken it from him. *Blake* v. *People,* 80 Ill. 11; *Newhouse* v. *Newhouse,* 14 Ore. 290, 292; *O'Callahan* v. *O'Callahan,* 69 Ill. 552; *Carlton* v. *Carlton,* 44 Ga. 216; *Peel* v. *Peel,* 50 Iowa, 521; *Allen* v. *Allen,* 72 Iowa, 502; *Wood* v. *Wood,* 61 N. C. 538; *Wright* v. *Wright,* 74 Wis. 439.

So long as the non-payment is the result of an inability to pay, the courts will refuse to imprison the husband. *Ex parte Silvia,* 132 Cal. 293, 69 Am. St. Rep. 58; *Pickard* v. *Pickard,* 23 Ga. 286; *Deen* v. *Bloomer,* 191 Ill. 416; *Kadlowsky* v. *Kadlowsky,* 63 Ill. App. 292; *Nixon* v. *Nixon,* 15 Mont. 6.

We urge that the decree appealed from shall be reversed and our old, infirm and unhappy client released.

C. Lee Crum, for appellee.

In the first brief filed by appellant's attorneys they argue this case to this court, as if the allegations in appellant's answer were considered by the court below to be true. This is not sound argument because appellant has failed to embody the evidence in this case in the bill of exceptions, so that this court may judge of the legality and justness of the decree appealed from. The chancery court of Union county is a court of general jurisdiction, and everything necessary is presumed to exist to make the judgment of this court valid, and unless the appellant can show affirmatively that there was no evidence heard, or unless he shows what the evidence all is, and that it is insufficient to support the findings of the chancellor below, this court will presume that everything was done below that should have been done to make this decree valid. I admit that if the appellant had shown his inability to comply with this order to pay alimony, that he should have been purged of his contempt, but as a matter of fact, his testimony showed that he was able to pay, and all the presumptions of law are in support of the conclusion that the allegations in his answer to the contrary were not supported by the evidence, and that the court found as a matter of the fact, that he was able to pay this small pittance as alimony, *pendente lite.*

The authorities cited by counsel for appellant, do not show or tend to show, in my opinion, that the jurisdictional ground of ability to pay this alimony must be re-

cited in the decree of the court holding appellant guilty of contempt. In fact all of the authorities hold that this court of general jurisdiction is presumed to have investigated and determined all these issues raised by the answer, and it is not necessary to recite these facts in the decree.

Counsel complain that appellant should have been given time in which to establish the truth of his answer. There is no application shown by the record for a continuance, and the presumption is, that if he made such application it was also passed on by the court and if the appellant was entitled to more time to make his defense it is conclusively presumed that he would have gotten it.

This old gentlemen has money to lend, and he absolutely turned his wife out of house and home with nothing to subsist upon, and although he alleges many things in his answer to the contrary, he was able to support none of his material allegations by any sort of proof, and now seeks to reverse the decree of the able chancellor below by presenting to this court a partial record—a record that contains only the pleadings and none of the evidence. I hope this court will see proper to affirm this decree as I believe the merits of this case reasonably required.

COOK, J., delivered the opinion of the court.

Lottie Hamblin filed a bill of complaint asking for a dissolution of the bonds of matrimony binding her and her husband, John Hamblin. The bill also asked that the court require her husband to pay her alimony *pendente lite.* John Hamblin answered the bill and denied all of the allegations charging him with a violation of his marital obligations, and also advised the court that he was old and decrepit and was financially unable to pay alimony *pendente lite.* A motion for alimony was made by the complainant, and the court recites in its decree that, "after hearing the evidence, doth find that the motion

should be sustained." Subsequently complainant filed a petition charging that "defendant has sufficient property out of which to pay said alimony *pendente lite,* but that he willfully and contentiously refuses to do so."

Defendant was cited to appear and show cause why he should not be held in contempt. He did appear and filed his answer, protesting that he had not contentiously refused to to obey the order of the court, but he had not paid the alimony for the compelling reason that he did not possess the ability to do so. Upon this state of the pleadings the court entered the following decree, viz.: "Be it remembered this came on to be heard on the petition of the complainant charging the said defendant with contempt of this court, for his failing to comply with the order of the court at the last term, to pay alimony *pendente lite,* when the court after being fully advised as to all matters and things pertaining thereto, and the defendant being heard in court and represented by counsel, the court doth find that the said defendant is in contempt of this court for his failure to comply with the said order of this court in paying said alimony *pendente lite,* which up to this time is one hundred dollars, and, the said defendant having refused to comply with the order of the court, he is ordered confined in the Union county jail until he does pay the amount due on said former decree or purges himself of said contempt; when he shall pay what is now due, he shall be discharged. He is hereby relieved from further payment of amounts hereafter becoming due under said former decree. Ordered, adjudged, and decreed the 1st day of November, 1912." This appeal is upon the record, and we have nothing before us save the pleadings and the orders and decrees of the court.

It is earnestly insisted that the chancery court should be reversed. It is contended that the record must affirmatively show the court judicially determined that the defendant was able to pay the amount the court ordered him to pay before he could be punished for contempt. We be-

lieve this to be a correct statement of the law. Looking to the decrees it appear therefrom that the chancellor was "fully advised as to all matters and things pertaining thereto," and, being so advised, judicially determined that the defendant was in contempt. To find that defendant was in contempt, it was necessary to find that he was able to obey the decree of the court. The defense was that he could not pay, and the chancellor must have found that his defense was not supported by the facts.

Affirmed.

H. F. SIVELY v. STATE.

[65 South. 118.]

BANKS AND BANKING. *Criminal offenses. Receiving deposits after insolvency.*

Where pending a decision of the board of directors to liquidate the bank because of its financial condition, the cashier received all deposits offered, but kept the same separate from the funds of the bank by pinning the money received from each depositor to the deposit slip and placing the same in a box, and after the appointment of a receiver, the identical money was returned to each depositor with a single exception, and where the failure of that depositor to call for and receive his deposit was the result of his failure to receive a notice to call at the bank and receive his deposit, in such case the cashier did not receive any deposit in violation of the statute.

APPEAL from the circuit court of Newton county.

HON. C. L. DOBBS, Judge.

H. F. Sively was convicted of receiving deposits in an insolvent bank, and appeals.

The facts are fully stated in the opinion of the court.

R. N. Miller and *Julian C. Wilson,* for appellant.

Geo. H. Ethridge, assistant attorney-general, for the state.

No brief of counsel found in the record.

COOK, J., delivered the opinion of the court.

Appellant was indicted and convicted for receiving a deposit of seventy dollars while he was acting as cashier of a bank he knew was insolvent, or had good reason to believe was insolvent, without informing the depositor of the bank's financial condition. There is a controversy about the insolvency of the bank at the time of the alleged deposit, but, in considering the question as to whether or not appellant received a deposit in the sense of the statute the insolvency of the bank will be assumed.

On the evening of the 18th day of June, 1912, the father of appellant, a director of the bank, left his home in Jackson, and went to Newton, where the bank was located, for the purpose of consulting with his associate directors about the condition of the bank. It appears that there were then reasons to believe that the bank was not in a prosperous condition, and it was necessary for the directors to take some action looking to the future government of same, and no doubt, appellant's father believed the bank would be liquidated. The directors of the bank were in session on the 19th and 20th of July, and on the latter date the decision to liquidate the bank was reached, and an order to this effect was entered on the minutes of the governing board.

In the meantime, on the 19th and 20th, the cashier (appellant) kept the doors open and received all deposits offered, but, upon the advice of his father, all deposits so received were kept separate from the funds of the bank; the identical money received from each depositor being pinned to the deposit slip and placed in a tin-box.

After the appointment of a receiver the identical money received during the two days was returned to each depositor, except the deposit of seventy dollars upon which the

indictment was based. The record shows that the depositor was notified by mail to call and the seventy dollars would be returned to him, but by some misadventure the depositor did not receive the notice, and the indictment naturally followed.

In short, pending the examination of the financial condition of the bank and the final action of the board of directors, the deposits were received in the manner stated for the purpose of returning same should the directors decide to liquidate. The depositors were not advised of this purpose of the bank, and, so far as they were concerned, the deposits were made and received in the ordinary way.

Two courses were open to the officers of the bank pending the decision of the directors; one to close the doors and refuse to receive deposits; the other the one pursued in the instant case. If deposits had been declined, a run on the bank was reasonably certain, and this probably would have put this bank, or any other bank, in the hands of a receiver, solvent or insolvent. It is easily conceivable that a bank solvent in the legal sense would be wrecked by a refusal to receive deposits; confidence once weakened is difficult to revive.

The question is, conceding that the cashier had good reason to believe the bank was insolvent when Mr. Atkinson delivered his money to the cashier: Did the cashier, under the facts of this case, "receive any deposit" in violation of the statute?

According to the undisputed intention and purpose of the cashier, the money received was not to become a deposit in case it was decided to liquidate. It was the undisclosed intention and purpose of the cashier to take the money conditionally. He never, in fact, received the money for the bank, and never mingled same with the bank's funds, nor did he record the transaction upon the bank's books. There seems to be no reason to doubt that appellant as cashier endeavored to protect the in-

terest of the depositor should disaster come. In other words, the record leaves no room for doubt of the cashier's intention to prevent any loss to individual depositors during the two days the board of directors were diagnosing the sick bank.

Under a state of facts similar to the facts in the present case, construing a statute in all essentials the same as ours, the supreme court of Pennsylvania, in *Commonwealth* v. *Junkin*, 170 Pa. 201, 32 Atl. 619, 31 L. R. A. 124, said: "Putting aside for the present the question raised as to Junkin's unanswerability criminally for the acts of his agent, assume that he had himself been in the bank that day, had personally received this twenty dollars at the counter, and had put it in an envelope, marked with Rice's name, to be returned to him in case the bank closed, and then did return to him the same twenty dollars, would that, within the meaning of the act, have been the receipt by a banker, knowing the bank to be insolvent, of money on deposit? The peril to and loss of the depositor's money arises from the concealed insolvency of the bank; but if it never mingles with or forms part of the bank's funds, which are assets for the payment of creditors generally, remains separate from all other funds, and is capable of absolute identification, so that it may be returned, and is actually returned, that does not constitute the criminal receipt of money as a bank deposit. The real deposit, whether on time or call, when passed over the counter, is thereafter the property of the bank absolutely. It is the intention of the depositor and the bank that the latter shall thereafter use it as its own by loaning it to others, and paying it out on checks drawn by others. The express or implied promise of the bank is that it will repay him, not that money, but that amount of money. In the case we are supposing the intention of the banker is to hand back the identical money received, and that intention is manifested, not by what he says, but by what he does, not only at the time, but

afterwards. This method of not receiving money on deposit by a banker knowing his insolvency, as demonstrated by the event here, is not an open, unequivocal observance of the law. He subjects himself to the peril of misconstruction of his real intention, and invites criminal accusation. But, unwise as may be the conduct, if no intention, in fact, existed to appropriate in aid of his insolvent bank the depositor's money, and he did not, in fact, so appropriate it, he is not a criminal. If such a transaction is not a deposit by a depositor, if there be no contract to which the minds of both parties assented, then it is not within the terms of the act."

In *State* v. *Strait,* 99 Minn. 327, 109 N. W. 598, the supreme court of Minnesota has this to say: "It is argued on behalf of the state that it was immaterial what effort appellant may have made to prevent the deposits being made, so long as it did not, in fact, result in the actual return of the money to the depositors; that what his intention may have been was immaterial, and he was bound absolutely by the technical legal result of his cashier permitting the money to remain in the bank and pass into the hands of the referee. Such is not our view of the law." This court also quotes with approval *Commonwealth* v. *Junkin, supra.*

In the last analysis the question to be decided in the present case is about this: Was appellant a felon when he took Mr. Atkinson's money, having good reason to believe that the bank was insolvent at the time, even though he intended to receive, and did, in fact, receive, the money as a special deposit, for the purpose of giving the directors an opportunity to kill or cure the bank, and in the former event it was his purpose to restore the money to Mr. Atkinson?

There are many ways by which the creditors of a hopelessly insolvent bank may be made secure, and there are also many ways by which a bank unable to meet all legal demands of creditors may be rejuvenated and put upon

its feet. It may have been, and probably was, the hope of the bank's officers that some way would be found to continue the operation of this bank upon a basis of solvency, so far as creditors were concerned, but, whether this is true or not, it is manifest that the cashier acted in perfect good faith with the depositor, by so arranging matters as to insure the return of his money in any event.

The statute is a wise and just law for the protection of bank depositors, but to hold that appellant violated this statute when he did the very thing the statute was designed to accomplish would be a sacrifice of the spirit to the letter of the law.

Mr. Atkinson has suffered no injury; the money deposited by him never became an asset of the bank, and should have been returned to him. Michie, Banks and Banking, 406.

Reversed, and judgment here discharging appellant.

Reversed.

SMITH, C. J., delivered a dissenting opinion.

The jury found, as a fact, and the majority opinion concedes for the purpose of this discussion, that at the time the deposit in question was received the bank was insolvent, and that appellant either knew or had good reason to believe that this was true. The money was received by the bank in the usual and ordinary way, and became, immediately upon its receipt, the property of the bank.

Appellant claims that it was the bank's intention to return the money to the depositor in event it should be determined by its directors that it was necessary for the bank to discontinue business. In other words, his claim is that the deposit was received without any intention of defrauding the depositor. The defect in this defense is that the presence or absence of an intent to defraud is immaterial; for the statute makes it unlawful to receive a deposit into an insolvent bank with knowledge of

its insolvency without reference to the intent with which the deposit was received. If a fraudulent intent is necessary, few convictions can be had under this statute, for the reason that, I think I am safe in saying, few deposits are received with an intention on the part of the bank officials of defrauding the depositor. Insolvent banks are usually kept open because of the fact that, should they discontinue business, it is hardly possible for them to realize the value of their assets, and because of the hope of their officials that they will in the end recoup their losses and be enabled to discharge all of their liabilities and save harmless their stockholders. The statute was designed to prevent insolvent banks from pursuing this course, to prevent them from continuing to receive, and subject to probable loss, the money of unsuspecting depositors. What happened here is just what the statute was designed to prevent; for the depositor has lost his money when, had he been told of the insolvency of the bank, he could have prevented the loss by not making the deposit.

It is true that by a proper proceeding this depositor could have recovered the particular money deposited by him while it remained in the hands of the bank, but this results not from the fact that there existed an intention on the part of the bank officials to return it to him in event a certain condition should arise, but results from that principle of law which permits a fraudulent contract to be repudiated by the innocent party and which then revests him with the ownership of property obtained from him by virtue of the fraudulent contract. Any depositor whose money has been received by a bank when insolvent, to the knowledge of its officials, can recover it while it remains in the hands of the bank, provided the insolvency of the bank was unknown to the depositor at the time the deposit was made. If authority is desired for this statement of the law, see 1 Bolles, Modern Law of Banking, 188, and, as illustrating the principle, *Bank* v. *Strauss*, 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579.

The statute here under consideration was construed in accordance with the views herein expressed in *Hughes* v. *Like,* 63 Miss. 552. In that case "L., a banker, having failed in business and made an assignment, H., one of his depositors, sued out an attachment against him on the ground that the debt due the plaintiff was 'fraudulently contracted.' On the trial of the issue joined to test the ground of the attachment the plaintiff adduced evidence tending to show that L. knew at the time he received plaintiff's deposit that the bank was insolvent." The plaintiff asked, but was refused, "an instruction to the effect that, if L. was guilty of violating the statute (the one here in question in receiving H.'s deposit, then he fraudulently contracted the debt therefor." This court affirmed the action of the trial court in refusing this instruction, and, speaking through Judge CAMPBELL, pointed out the distinction between the civil and criminal liability of a banker for receiving a deposit into his bank knowing it to be insolvent, as follows: "The first instruction asked by the plaintiff was properly refused, and was correctly modified by the court. It is true that one may be guilty, and sent to the penitentiary, under paragraph 2814 of the Code, without having entertained the fraudulent purpose necessary to sustain an attachment. Guilt, under paragraph 2814, depends on the facts recited in it, and not upon intent or purpose. The object of the statute is to protect the confiding public from the victimization apt to result from depositing in an insolvent establishment, and it seeks to give protection by denouncing its penalty against him who receives a deposit, knowing, or having good reason to believe, that the establishment is insolvent, without informing the depositor of such condition. Receiving a deposit in such circumstances constitutes the crime, no matter what may be the purpose or hope of the person receiving it. He may think all will be well, and that his insolvent condition will never be known, and that he will achieve success by the use of his

credit, and his purpose may be to act honestly and pay all depositors, but, if he receives a deposit, knowing or having reason to believe that insolvency exists, he is guilty of a felony, and cannot escape the just consequences of his crime because of his hopes and purposes. The legislature has determined that it is dangerous to the community for an insolvent bank to receive deposits, because of the probable result, and, in order to prevent the evil, has declared it felony for any person to receive deposits into an insolvent establishment without informing the depositor of such condition. No professed or really existing honesty of purpose will relieve against the crime, which consists in doing what is forbidden, regardless of motive. If the bank is insolvent, dare not to receive a deposit from an unsuspecting person, but tell him of the insolvent condition, that he may foresee the evil and avoid it." It is true that the criminal liability of the defendant was not there in question, but it was necessary in order that the court might intelligently decide the matter before it for it to draw the distinction between civil and criminal liability under the statute, and, while it may be that the construction there placed upon the statute is not binding upon us, it expressed the views of a very able court, and, in my judgment, is correct. The statute has been twice re-enacted since that case was decided, and for that reason the views therein expressed, whether necessary to the decision or not, should not be lightly disregarded.

Only two cases have been cited in support of appellant's contention, and these are the two referred to in the majority opinion, to wit, *Commonwealth* v. *Junkin,* 170 Pa. 194, 32 Atl. 619, 31 L. R. A. 124, and *State* v. *Strait,* 99 Minn. 327, 109 N. W. 598. The first decision seems to proceed upon two grounds: (1) That the deposit was received without any intention to defraud; and (2) that no deposit was, in fact, made, for the reason that the person receiving the deposit secretly intended to return it. The

ground on which the second case proceeds is not clearly stated, but it refers to the first as authority for the conclusion reached. I have already discussed the first ground on which *Commonwealth* v. *Junkin* proceeds, and do not deem the second worthy of consideration, for the reason that no other cases have come under my observation wherein it is held that a contract can be modified or changed by reason of an intention on the part of one of the parties thereto different from that expressed in the contract and not disclosed to the other party. In the case of *State* v. *Strait,* the deposit there in question had been received by the cashier and mingled with the money of the bank before he was notified by Strait, one of the owners of the bank, to put all money received on deposit in envelopes marked with the names of the depositors, so that it might be returned to them. An amount of money equal to the deposit in question was then put in an envelope, marked with the depositor's name, and, though by an oversight it was not returned to the depositor, the court held that no crime had been committed. It would follow from this that no conviction can be had if the debt which the bank owes the depositor by reason of his having made the deposit is afterwards paid. At least one statute has come under my observation which contains a provision to the effect that loss to the depositor must result from the reception of the deposit in order for a crime to be committed, but the statute here under consideration contains no such provision.

It may be, and I am inclined to think, that the statute should be amended so as to provide for the doing of what was done by appellant here, but that is the province of the legislature, and not of the court. Should the statute be so amended, the amendment should be so framed as to protect the rights of the unsuspecting stockholder, as well as of the person receiving his deposit.

For these reasons, I think the judgment of the court below should be affirmed.

REED, J., delivered a concurring opinion.

The chief justice, in his dissenting opinion, referring to the alleged deposit, says that "the money was received by the bank in the usual and ordinary way, and became immediately upon its receipt the property of the bank." I cannot agree that this is shown by the proof. I understand from the evidence that Mr. Atkinson handed to appellant, the cashier of the bank, to be deposited, seventy dollars in currency, consisting of one twenty dollar bill and ten five dollar bills, and received a duplicate deposit ticket therefor. This currency was taken by appellant, pinned to a deposit slip, placed in a tin box set apart to receive sums left by others on the same day, and never entered upon the books of the bank as a deposit nor mingled with its general funds. All of the other money left with the bank by other parties was returned after the bank's failure, except the amount which was handed in by Mr. Atkinson. It appears that the different persons were notified to call and get their money, and that Mr. Atkinson failed to receive the notice mailed to him.

I understand that Mr. Atkinson's money went into the hands of the temporary liquidator of the bank, and was afterwards turned over to the receiver, and was brought into court on the trial of this case. During all of this time it was kept separate from other funds, and kept just as it was received by appellant.

The record shows that appellant did physically receive this money over the counter and into his possession, but it is not shown that when it came into his hands it was treated and disposed of as an ordinary deposit in the bank and as the property of the bank. Appellant kept it separate and apart from the funds of the bank, and purposed and endeavored to return it to Mr. Atkinson. Mr. Atkinson did not receive information as to this. However, appellant is not on trial for failure to tell Mr. Atkinson of his purpose to keep the money separate and apart from the funds of the bank and return it in the

event of the bank's failure. The offense charged against him is receiving a deposit into an insolvent bank.

Was this such a deposit as is meant by the statute? Surely the statute means a general deposit; that is, the placing of money in a bank to be repaid on demand "in any current money not the same pieces of money deposited." In such deposit the title to the money deposited passes to the bank, which becomes the debtor to the depositor for the amount. Black's Law Dictionary. It was undoubtedly the purpose of Mr. Atkinson, when he presented his money to the appellant, to make a general deposit in the bank, but the making of such deposit does not consist alone of the act of the one who desires to deposit his money. The amount offered must be received into the bank. It must become a part of the bank's funds. The entire transaction between the two parties is that which constitutes the contract of deposit. If a contract, the minds of the parties thereto must meet. I do not find that this was so in this case. Mr. Atkinson purposed to make a general deposit, but appellant did not, on his part, receive it as such. Their minds did not meet. The contract of a general deposit was not completed.

I do not know that we can term the transaction between Mr. Atkinson and appellant as amounting to a deposit. If it can be, from any view, termed a deposit at all, then I see in it a special deposit; that is, "one in which the depositor is entitled to the return of the identical thing deposited (gold, bullion, securities, etc.) and the title to the property remains in him, the deposit being usually made only for purposes of safe-keeping." Black's Law Dictionary, citing *Shipman* v. *State Bank,* 59 Hun, 621, 13 N. Y. Supp. 475; *State* v. *Clark,* 4 Ind. 318; *Brahm* v. *Adkins,* 77 Ill. 263; *Marine Bank* v. *Fulton Bank,* 2 Wall. 252, 17 L. Ed. 785.

In discussing what is a special deposit, Mr. Bolles, in his treatise on the Modern Law of Banking, vol. 1, p. 434, says: "The term 'special deposit' has a varying judi-

cial meaning. Thus a court in Illinois, when saying that a special deposit must always be returned to the owner, whether the bank is solvent or otherwise, meant a specific thing, like a bond or a specific deposit of money. To these may be added deposits marked 'special,' or which are put into a special place at the time of receiving them, because of the bank's pending insolvency, or other reason."

The facts in this case clearly show to me that this money was received into the bank by appellant, and treated and held as the property of Mr. Atkinson, and that the title thereto did not pass to the bank, but remained in him. The bank did not become his debtor for the amount. It was not a general deposit "received by the bank in the usual and ordinary way." It was not the receiving of money into the bank as a deposit, which is made a criminal offense by statute.

The chief justice quotes at length from *Hughes* v. *Lake*, 63 Miss. 552, and I gather from what he writes that he relies upon the discussion of the purpose of the statute in the opinion in that case to sustain his views in the present case. I do not see how this case can, in any manner, be controlled by the decision of the court in *Hughes* v. *Lake*. The eminent judge who delivered the opinion did very fully express his approval of the statute. I am sure we all agree that the proper enforcement of the statute will be very helpful in protecting the confiding depositors from losing their money. I believe that the great man had in mind, while writing the receiving of an ordinary or general deposit into an insolvent bank. That is what is forbidden. The wrong act condemned by the law is the taking of money from a depositor into the funds of an insolvent bank, and thereby causing him loss. The depositor must be defrauded or injured by the taking of his money. This will be so if it is taken into an insolvent bank as a general deposit and mingled with the funds of the bank. It will not be so if the money is

received by a teller, and not taken into the funds of the bank, but kept separate and apart as the property of the one offering to deposit it, and so that the identical money may be returned to him. We may approve the sentiments expressed by the judge delivering the opinion in the case of *Hughes* v. *Lake* without in any manner recognizing that there was anything decided in that case to control the case at bar.

The chief justice says in his dissenting opinion that only two cases have been cited in support of appellant's contention. We learn from the able and painstaking counsel who represent appellant that a very thorough search of the books only disclosed two cases in point. It is significant that both of these cases sustain the position of the majority opinion in this case. The case of *Commonwealth* v. *Junkin*, 170 Pa. 194, 32 Atl. 619, 31 L. R. A. 124, is very like the present case. This is shown in Judge COOK's reference to that case and his quotation from the opinion therein.

I think the case of *State* v. *Strait*, 99 Minn. 327, 109 N. W. 598, also fully sustains the decision in this case. Judge COOK quoted from the opinion, and Judge SMITH referred to the facts, in that case. I will presume to make a more extended quotation, including that already made, because I deem it very pertinent in this consideration, and helpful in reaching a right conclusion in this case: "The cashier testified that he followed appellant's instructions, put the amount (though he could not say it was the identical money) received by the two depositors that morning in separate envelopes, addressed to the respective depositors, and laid the same in the safe. It appears that after closing of the bank, but before the money had been returned to the two depositors, a committee representing the bank's depositors, headed by the county attorney, visited the bank, and in the excitement the actual delivery of the envelopes was overlooked, and the receiver in bankruptcy took charge of appellant's estate, including the

bank and its contents. We will assume that the referee in bankruptcy acquired title to the money for the creditors as against the depositors, so that, conceding there was technically a deposit, in the sense that the depositors lost title to their money, yet is the inference warranted from the facts and circumstances stated that there was a deposit such as to constitute the criminal offense contemplated by chapter 219? It is argued on behalf of the state that it was immaterial what effort appellant may have made to prevent the deposits being made, so long as it did not, in fact, result in the actual return of the money to the depositors; that what his intention may have been was immaterial, and he was bound absolutely by the technical legal result of his cashier permitting the money to remain in the bank and pass into the hands of the referee. Such is not our view of the law. We are decidedly of the opinion that, if the evidence referred to is true, appellant took every reasonable precaution which could be taken to prevent the occurrence of the very act for which he stands charged in the indictment. The inevitable inference from the declarations and acts of appellant, and from all the evidence, is that the accused did not willfully or negligently receive, or permit his agents to receive, the money."

I do not see that the proof in this case is sufficient to support the conviction of appellant for violation of the statute.

ARIZONA SHELTON *v.* IRA MINNIS *et al.*

[65 South. 114.]

1. INSURANCE. *Mutual benefit insurance. Children. Code* 1906, *section* 1655.

Under the Constitution and by-laws of a mutual benefit association, providing that benefits should be payable only to certain relatives including "children," an illegitimate child of a female member is not excluded from sharing the benefits, in view of section 1655, Code 1906, which provides that illegitimate children shall inherit from their mother.

2. SAME.

Where, in such case, the member surrendered a policy naming her husband as beneficiary, and procured a new policy to be issued naming her illegitimate child as the beneficiary, it was entitled to the benefit.

3. MUTUAL BENEFIT INSURANCE. *Beneficiaries. By-laws.*

In determining who is entitled to receive the benefits of mutual benefit associations wherein the money contributed by its members provides the funds from which the benefits are paid, a liberal construction to the by-law of the association so as to effect the purpose of the parties to the contract should be given.

APPEAL from the circuit court of Leflore county.

HON. MONROE MCCLURE, Judge.

Suit by Arizona Shelton against the Grand United Order of Odd Fellows, which interpleaded Ira Minnis, from a judgment for Minnis, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Lomax & Tyson, for appellant.

On the proposition of Arizona Shelton, although an illegitimate child, being embraced within the meaning of the word "children," as used in the by-laws of the defendant order, we are inclined to believe that both opposing counsel and ourselves have been far estray from the

proper point of view in the discussion of this feature, in the briefs already filed in this case. The holding of the Massachusetts court in *Ligue des Patriots,* 54 L. R. A. 814, cited by opposing counsel, to the effect that the word, "children" did not embrace, within its meaning, an illegitimate child, was an interpretation of the meaning of the word as used in a statute and not as used in the constitution and by-laws of the association as stated by counsel. In all cases where the use of a word in a statute, is under consideration, such a construction is proper. But the word, as used in the by-laws of the Odd Fellows Benefit Association, should be construed to mean what the parties to the contract intended it to mean. And in seeking to ascertain whether or not the parties to this insurance contract intended to exclude illegitimate children, the use of the word "children" in the by-laws of defendant order should be given its common, ordinary and popular meaning, and not such legal technical meaning, as is given it, by the court in interpreting its meaning as used in a statute. The law can determine the meaning of the word "children" as used in the statute, but not as used in a contract, where the intention of the parties alone governs the interpretation; and it must be taken that the word "children," as used in the case at bar, was intended to be used in its commonly accepted, ordinary and popular sense. Webster's International Dictionary, 1911 Edition, defines the word "child" to mean "a son or daughter; a male or female descendant in the first degree; the immediate progeny of human parents; in law legitimate offspring." This definition is, in substance, as given in other standard dictionaries. The meaning of the word "children," as commonly and ordinarily understood and used, by people generally, does not exclude illegitimates. Bacon on Benefit Societies, sec. 257; 37 L. Ed., U. S. Rep. 745; 39 L. Ed., U. S. Rep. 549; 40 L. Ed., U. S. Rep. 203; 1913 Ann. Cases, 1243.

If there is any doubt of the ordinary meaning of this word, when used by people generally, there can certainly

be none when used by members of the negro race in dealings and contracts among themselves. It is a matter of such common knowledge, as the court can take judicial notice of, that the custom prevails, not only in this state, but through the entire south, of there being no distinction recognized by negroes, between legitimate and illegitimates, when they used the word "children," in dealings between themselves. 1 Elliott on Evidence, sec. 64; 2 Elliott on Contracts, secs. 1513, 1517, 1705, 1713, 1720, 1721, 1790. *Spegler* v. *Williams,* 67 Miss. 1; *Hancock* v. *Naval Stores,* 93 Miss. 822.

We submit, that if there should be any doubt, in the mind of the court as to whether or not the use of the word "children," in the by-laws of the defendant order, included illegitimates, such doubt will be resolved in favor of appellant, Arizona Shelton.

C. C. Moody, for appellee.

It is asserted that Arizona Shelton was eligible to be named as a beneficiary, notwithstanding her illegitimacy.

The purpose for which the association was created was to provide an endowment fund to be paid only to certain designated relatives of deceased members, to wit: Husband, wife, mother, father, children, sister, brother, uncle, aunt, nephew, niece or dependent relatives.

It is claimed that Arizona Shelton, an illegitimate child, is a child of the assured within the meaning of the word "children" as used in section 4 of the Constitution and by-laws. It is said that the popular meaning of the word "children" includes illegitimate as well as legitimate children. This, I expressly deny. Webster's International Dictionary, 1911 Edition, referred to by the attorneys for the appellant, defines the word "child" to mean, "A son or daughter; a male or a female descendant in the first degree; the immediate progeny of human parents; in law legitimate offspring." This very authority cited by counsel itself defines the word "child" to mean legitimate offspring.

In the Black's Law Dictionary, the word "children" is defined as follows: "Offspring; progeny; legitimate offspring; children born in wedlock."

In no dictionary that I have been able to find does the word "children" appear to be defined as including illegitimate offspring. On the contrary it is defined as including legitimate offspring. Therefore, I contend that the popular meaning of the word "children" includes, and only includes, legitimate offspring of their parents and never illegitimate offspring.

The word "children," when used in the statutes of any state, the constitution or by-laws of any corporation, or when used in any contract whatever, has always been constructed to mean legitimate children unless a contrary intention is clearly expressed. This is the universal rule of construction and in the absence of anything clearly indicating an intention to include illegitimate, the word "children" has never been construed to mean any but legitimate offspring.

But I take it that I am unnecessarily taking up the time of this court on this question. This court, I take it, is not going to construe the word "children" as used in section 4 of the constitution and by-laws of the Odd Fellows Benefit Association to include illegitimate children. The purpose for which this order was created was to create an endowment fund to be paid, among others, to the legitimate children of the member of the order and this court will not hold that the purpose for which that order was created was to create a fund to be paid to the illegitimate children of its members. Therefore, I contend that Arizona Shelton, as an illegitimate child, was not of the class for whose benefit the order was created and to whom the fund created should be paid, and not being of that class, a certificate in which she is named as beneficiary, is, by virtue of section 16, a nullity. This section not only provides that no payment shall be paid on such a certificate, but it, in effect as well, provides that the certificate itself shall be void.

The laws of the association not only prescribe those to whom the fund shall be paid, but as well prescribes, that no benefit shall be paid to any one not of that class and in addition, that if a certificate to that effect is issued, it shall be void. Even if section 16 was not incorporated in the constitution and by-laws of the order, I would still contend that a certificate in which one not of the class prescribed by section 4 is named as beneficiary, would be a nullity.

COOK, J., delivered the opinion of the court.

Appellant sued the Grand United Order of Odd Fellows upon a certificate, or policy, of insurance written by it upon the life of her deceased mother, and made payable to appellant. The defendant filed its plea, or interpleader, and paid into court the amount covered by its policy of insurance, admitting its liability, but averring that Ira Minnis, appellee, and husband of the deceased, had propounded his claim to the money due on said policy, and asked that he be summoned to appear and contest with appellant his right to the money. Ira Minnis did enter his appearance and propound his claim, and after hearing the evidence the court awarded the money to the husband, and from this judgment this appeal is prosecuted.

It appears that Sarah Minnis, the mother of appellant, and the wife of appellee, being a member of the order of Odd Fellows, on the 10th day of August, 1906, applied to the Odd Fellows Benefit Association for a policy of insurance on her life, payable in the event of her death to Ira Minnis, her husband. This policy was issued as applied for. On the 24th day of April, 1911, Sarah Minnis, desiring to change the beneficiary named in the policy, applied to the association and surrendered the policy, signing the following indorsement written on the back of same, to wit: "I hereby surrender to the Odd Fellows Benefit Association of the G .U. O. of O. F. of the district of Mississippi the within policy, and direct that a new

one be issued to me, payable to Arizona Shelton, child." In accordance with her direction, the officers of the association issued and delivered to her the policy upon which this suit was instituted, making the same payable to appellant, Arizona Shelton. The record shows that Arizona Shelton is the illegitimate daughter of the deceased, Sarah Minnis.

The constitution and by-laws of the benefit association state the objects and purposes of its organization as follows: "The purpose for which the Odd Fellows benefit is created, is to insure the lives of the members of the Grand Order of Odd Fellows and Household of Ruth, and provide an endowment fund to be paid only to the following relatives of deceased members of the association who were financially, at the time of their death, in the Odd Fellows Benefit Association, the Grand Lodge, and their subordinate lodge, viz.: Husband, wife, children, mother, father, sister, brother, uncle, aunt, nephew, niece, or dependent relatives."

It is contended by appellee that the issuance of the policy payable to Arizona Shelton, the illegitimate daughter of the deceased mother, was *ultra vires*. It is also contended that Sarah Minnis only intended to change the beneficiary in the original policy, and that this was also the purpose of the association's officers, but this intention of the contracting parties was defeated by their misinterpretation of the by-laws and constitution of the order. It is said that the laws of the association did not authorize it to issue a policy payable to the illegitimate child of the insured; the word "children" in the by-laws referring to legitimate children alone. Upon this assumed lack of power in the association to make a policy issued upon the life of a mother payable to an illegitimate child is based the theory that the original policy payable to the husband remained in force, the policy payable to the illegitimate being void. This view seems to have been adopted by the trial court.

It seems to us that in determining who is entitled to receive the benefits of mutual benefit associations, wherein the money contributed by its members provides the fund from which the benefits are paid, we should give a liberal construction to the by-laws of the association so as to effect the purposes of the parties to the contract. However the common law may have limited the civil rights of bastards, it seems clear that the public policy of this state expressed in its inheritance laws carries us far away from the harsh rules of the common law. Section 1655, Code of 1906, recognizes fully and unreservedly the more humane rule that all illegitimates shall inherit from their mother. This statute seems to imply that the mother and not the innocent child shall be held responsible for her sins, and, further, that the illegitimate child shall receive from its dead mother the fruits of her labor or fortune. Is it not fair to assume that it was the purpose of this benefit association to accord to all children of a mother member the same rights and privileges the statute laws of the state have, in principle, given them —whether the children be legitimate, or illegitimate? A child capable of inheriting would seem to come within the class designated by the by-laws. Certainly the child has an insurable interest in the life of its mother, and it seems equally certain that the by-laws were not designed to discriminate between legitimate and illegitimate children possessing equal rights to inherit from their mother. The mother in this case believed that her illegitimate daughter was one of her children, and so did the officers of the association.

We believe they correctly interpreted the meaning of the by-laws, and the judgment of the lower court is reversed, and judgment will be entered here for appellant.

Reversed.

STATE TO USE OF JOHNSON *et al. v.* W. W. CUNNINGHAM *et al.*

[65 South. 115.]

1. SHERIFFS AND CONSTABLES. *Apprehension of fugitives. Misdemeanant. Negligent shooting. Action on bond. Arrest. Mode of making arrest. Care required. Killing fugitive misdemeanant. Plea. "At." "Towards." Mode of arrest. Discharge of firearms.*

A sheriff and the sureties on his official bond are liable in a civil action for damages arising from the intentional or negligent shooting of a misdemeanant who flees to avoid arrest.

2. ARREST. *Mode of making arrest. Care required.*

An officer arresting a fugitive misdemeanant owes to him the duty to exercise care and precaution not to injure him; nor must he discharge a firearm while in pursuit, in such a manner as to cause such fugitive injury.

3. SHERIFFS AND CONSTABLES. *Action on bond. Killing fugitive misdemeanant. Plea. "At." "Towards."*

Where a declaration in an action against a sheriff and his bondsmen for the killing of a misdemeanant in attempting to effect his arrest, alleged that the sheriff failed to faithfully perform the duties of his office and disregarding such duties in his attempt to arrest "J" for the offense of disturbing public worship, did negligently and unjustifiably fire his pistol "at" and "towards" the said "J" as that the ball struck and killed him. In such case the gravamen of the cause of action was the sheriff's negligence in making the arrest, whereby deceased lost his life, the word "at" meaning "near, about, under, over, toward," and the word "toward" "in the direction of" and were therefore not effective to narrow the charge to an allegation that the sheriff pointed and aimed his pistol directly at deceased when it was fired.

4. SHERIFFS AND CONSTABLES. *Liability on bond. Mode of arrest. Discharge of firearms.*

A sheriff pursuing a fleeing misdemeanant who willfully and intentionally fires a modern pistol of high power in the direction of such fugitive and the bullet strikes and kills him, is guilty of

a negligent, intentional and willful wrong for which he and his bondsmen are liable, whether he shot directly at the fugitive or the bullet struck a twig and glanced and struck deceased.

5. WEAPONS. *Firearms.*

The highest degree of care is exacted of a person using firearms. They are extraordinarily dangerous, and in using them, extraordinary care should be exercised to prevent injury to others.

6. ARREST OF FUGITIVES. *Discharge of firearms.*

The custom among officers to fire their pistols when pursuing fugitives, even when they are misdemeanants as a ruse to prevent their further flight, is a reckless use of firearms.

APPEAL from the circuit court of Prentiss county.

HON. J. H. MITCHELL, Judge.

Suit by the state for the use of John A. Johnston, and others against W. W. Cunningham and others. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Thos. H. Johnston, E. C. Sharpe and *A. J. McIntyre,* for appellants.

Appellees' argument seems to be based upon the idea that the phrase in the declaration, viz.: "Fired his pistol at and towards the said Johnston," must be met by proof on our part, that the sheriff actually fired his pistol directly at and towards the boy who was killed; and that proof that the pistol was fired to one side, or above the boy, meets the issue presented by the pleadings, and entitles them to a verdict. Counsel's argument, reduced to the last analysis, simply means this, that if the sheriff had offered proof that he fired one inch to the right, or above the boy, or any other inappreciable distance, and could have convinced the jury of the truth of such statement, that this would entitle him to go free of all liability, because he had shown that he had not fired directly at and towards the boy. The two words "at and towards," taken in the narrowest sense, do not necessarily mean directly towards. The word "at" in its primary meaning

and significance, means "in or near;" and the word "towards" means "in the direction of." So giving the phrase its primary meaning, it could but mean, "in or near the direction of the boy;" but we contend that this phrase, taken in connection with the other matter alleged in the declaration, is broad enough to cover liability for the negligent, careless, willful and intentional killing of the boy by the firing of the pistol by the sheriff. The only case which we have been able to find where a similar phrase has been construed is that of *Lange* v. *State,* 95 Ind. 114, 115.

But we submit, that even if it were incumbent upon appellants, under the pleadings, to prove that the sheriff fired directly at and towards the boy, as they so strongly contend that it does, but which we in nowise admit, the peremptory charge should have been granted upon the second ground urged in our original brief. That is to say, there was ample evidence by appellants' disinterested witnesses, and the physical facts show, that the shot, whether intentionally or not, was fired directly at and towards Johnston, and there was no evidence to countervail this. The testimony of appellees' witnesses was utterly at war with the proven physical facts and the laws within the knowledge of common experience and did not produce even a scintilla of evidence.

Relative to the extreme care required by those who handle firearms and the liability for injuries inflicted by by their discharge, counsel seem to think that these cited in our original brief go to unwarranted extremes. In view of the lamentable frequency with which injuries and death occur from the negligent handling of firearms, we doubt if they go far enough. There is a line of cases in which injuries are inflicted by one to another of a hunting party. The courts in these cases hold the plaintiff to proof of negligence in the handling of the firearm, apparently holding that the party injured, to a certain extent, assumed the risk, or at least voluntarily exposed

himself to the risk of accidental injury by joining the hunting party. 12 Am. & Eng. Ency. of Law, 520.

In the case of *Dixon* v. *State,* —— Miss. ——, 61 So. 423, cited by counsel, the principal ground for reversal in that case, was that an instruction was given which was tantamount to a peremptory charge. This being a criminal case, the court held such a charge to be reversible error, for a peremptory charge can never be given to find the defendant guilty. Had this been a civil suit against Dixon for damages, would there have been any question as to the propriety of giving such a charge? He would have been liable beyond question. To this point see the case of *Knott* v. *Wagner,* —— Tenn. ——, 16 Lea., 481, where it was held that the defendant fired his gun within two hundred yards of a public highway, which was forbidden by the statutes of the state, was liable for the injuries resulting from his wrongdoing.

The case of *Cleghorn* v. *Thompson,* 54 L. R. A. 402, also cited by counsel, seems to have been decided upon the principle that the result of the defendant's action, in firing at a marauding dog running up hill towards a highway, three hundred and fifty to four hundred yards away, the bullet striking some object and glancing and killing a man in the highway, which it is doubtful that defendant even saw, could not have been foreseen. But the principle of law laid down in the case cited in our original brief is not criticised, or commented upon. To the contrary the annotator cites in the note to said case, the case of *Sullivan* v. *Dunham* (N. Y.), 47 L. R. A. 715, where it was held that where a person was killed on a public highway by a missile thrown by the explosion of a blast, the person firing the blast was held guilty as a trespasser without regard to his negligence. This seems to be the general rule where dangerous agencies are used.

Jas. A. Cunningham, for appellees.

Counsel for appellant, in their able brief, set up two lines of argument to convince this court of the merit of

their contention, under assignment of error I. First, they take the position that the very act of the sheriff in shooting (though the death of Johnston is shown to have been effected by an entirely different cause, and under entirely different circumstances of shooting to that alleged) was unlawful, and that by his unlawful conduct, appellees are precluded from showing circumstances exculpating themselves from the clutches of the law.

So at this late hour, appellants seek to avoid the very burden assumed by them in specifically averring, in their declaration, that appellee Cunningham, sheriff did on this occasion, "negligently, carelessly, recklessly, wilfully, intentionally, wrongfully, and unlawfully, fire his pistol at and toward the said Frank Johnston," etc. This appellees denied; the issue so made went to the jury, and they found against the contention of appellant.

The purpose of the court in refusing instructions numbers 6, 7, and 8, complained of by appellant under assignment II, could not have escaped again the understanding of the learned counsel for appellant; and the instructions complained of under assignment III, given appellees, announced in unmistakable terms the purpose of the court to confine appellants to the issue made in this declaration, which was the only open course in the absence of amendment, and in support of the court's action, we quote the following authorities, which we think amply support his views, to wit: Hughes on Procedure, 1905 Edition, "Variance," page 1254; *Bristow* v. *Wright,* L. C. 135; I Gr. Ev., 51, 63-65; 2 Id.; See *Res Adjudicata.*

Pleadings, among other things, limit issues and narrow proofs. Consequently they are to exclude departures and variances; and courts cannot therefore authorize the latter without practically abolishing pleadings, which is impossible in a constitutional government. See, also, Puterbaugh's Common Law Pleading and Practice, 1904 Edition, pp. 27, 28. Also, the following: 29 Cyc. 583-5; 31 Cyc. 672, 3, 674; *Richards* v. *City Lumber Co.,* 101

Miss. 691; *A. & V. R. R. Co.* v. *Groome,* 97 Miss. 209; 14 Am. & Eng. Pleading & Practice, pp. 342, 343.

The contention that, because this pistol was fired by the voluntary act of the sheriff and resulted in the death of Johnston, appellees are precluded from being heard on the defense set up in this record, is a most unreasonable demand—one that could not be maintained even under a declaration of general negligence against the sheriff for wilfully, etc., firing his pistol in the manner shown by this record.

The sheriff's sworn and official duty to make arrests under the circumstances such as confronted Cunningham on this occasion, is stripped by counsel for appellant of every semblance of its meaning. While no one would think it his duty, or even his right, to shoot wilfully or negligently at or toward Johnston, as alleged in this case, to effectuate this arrest, yet both public policy and the law demand that a sheriff exercise all reasonable means to arrest the participants of a drunken brawl and fight on an occasion of a religious meeting on the Sabbath Day. Not to be active and resourceful in effecting such arrest would expose a peace officer to the daring and ridicule of criminals and subject him to the contempt of law-abiding citizens.

A sheriff is only confined in the selection and exercises of the means of arrest to such reasonable means as ordinarily prudent men would likely adopt under similar circumstances. The officer, on this occasion, attempted the arrest by means of pursuit, by commanding decedent to stop, by threatening to shoot him if he did not stop, and by actually firing his pistol to get him to stop, at what would appear to any reasonable mind to be a safe range to preserve the safety of Johnston and all others. As to whether or not a sheriff or anyone else, in an effort to perform a duty, has selected reasonable means, and has exercised reasonable care in carrying the means into effect is, when controverted, a matter to be left to the

sound discretion of a jury. Counsel seem to overlook the fact that the shooting was adopted by the sheriff as one of the means of achieving this arrest.

There is the strong and well-reasoned case of *Cleghorn* v. *Thompson* (Kan.), cited in 54 L. R. A. 402, in which a ball fired from a gun at a dog was deflected, and struck and killed Thompson, who was travelling upon the public highway in the vicinity of the directed shot. Appellant claimed, in that case, as in this, that the firing of the Winchester rifle at the dog, resulting in the death of this man, precluded the offender from showing that the killing occurred by the misfortune or accident of an unforseen, intervening cause, which deflected the ball and gave it the fatal range. But the court held differently. Now what constitutes actionable negligence? A reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all.

The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. Pollock, "Torts", 36. But we cite the following case of *Dixon* v. *State,* 61 So. 423, which is another case of a deflected ball, in which the law on this question is so clearly and forcefully defined as to place it beyond cavil or doubt. This case is found not only on the highest character of reason, but is amply supported by the authorities cited by the court. We are perfectly contented to rely upon these two cases as the unmistakable announcement of the law on this subject.

Complaint of counsel under assignment of error IV to the court's ruling in permitting certain testimony introduced on the part of appellees, showing the custom

among officials of experience, to fire as a ruse to effect arrest, cannot in any way be prejudicial to the rights of appellant, if, for argument's sake, the same be conceded as error. This evidence was introduced to show the reasonableness of Cunningham's purpose in firing off his pistol, and to go in for what it was worth in showing the reasonableness of the stories of the witnesses for appellees, who swore the pistol was so fired.

We most earnestly insist that this record discloses a cause fairly submitted to a jury on the issue joined, and one in which a fair jury rendered its finding on the facts as presented on the issue, and that their finding should not be molested by this court.

REED, J., delivered the opinion of the court.

Appellants, the parents and brothers of Frank Johnston, brought suit against appellees, W. W. Cunningham, the sheriff of Prentiss county, and the sureties on his official bond, for the full penalty of the bond, claimed as damages for the wrongful death of Frank Johnston, who was shot and killed by the sheriff. Frank Johnston, when killed, was twenty years old. He was a hunchback, carrying his head tilted far back and a little to one side, and was five feet high. On Sunday, September 18, 1910, at a church meeting in the country, called an "all day singing," several boys, including Frank Johnston, became engaged in a fight, or disturbance of the peace. The sheriff's attention was called to the matter and with two deputies he proceeded to arrest the boys. The scene of the disturbance was something over one-hundred yards from the church. When the sheriff and his deputies approached, Frank Johnston ran off through the woods and was followed by the officers and a number of other persons. After running a distance of one-hundred to one-hundred and fifty yards, the sheriff drew his pistol and fired. The boy dropped instantly, shot in the head, and died in a short time. While pursuing Frank

Johnston, the sheriff called to him, "Stop, or I'll shoot you!" and the youth replied, "Shoot, damn you!" One witness testified that the sheriff fired just as Johnston made his reply. Another witness said that he heard the sheriff speak to Johnston and then shot as he turned his head to reply. The sheriff testified that he went some steps before firing. He says that he told Johnston several times to stop or he would shoot, and that the boy made reply. There was a clear or open space in the woods from where the sheriff stood when he shot to where the young man fell. The distance between them is estimated by the witnesses to have been about fifteen or seventeen yards. The bullet entered the left side of the head, a little behind and above the left ear, and ranged forward and downward and to the right. The downward range of the bullet was estimated by one physician to be about thirty degrees, and by another, about forty-five degrees. The wound was a round bullet hole. Measurements by an engineer of the elevations of the places where the sheriff stood when he fired and where Johnston fell, as located by the witnesses for plaintiffs, show the same to be practically on a level. The sheriff states that the young man was on higher ground than he was and he estimates the difference to be about six feet. There is a conflict in the testimony as to whether the sheriff or the boy was on a higher elevation. The pistol used by the sheriff was a 41 Colts, loaded with a long cartridge and a round nose lead bullet. Frank Johnston had been guilty of committing a misdemeanor, only when his arrest was sought. Appellants' testimony shows that the sheriff, while still following the boy and comparatively near to him, pulled out his pistol, presented it, fired, and the boy fell immediately, shot in the head. The sheriff testified that he fired at an angle of forty-five degrees and at the same angle up. Several of his witnesses support his statement, that he did not aim directly at the youth, but to the right and up.

It is contended by appellants that the trial court erred in refusing them a peremptory instruction.

There can be no question that a sheriff and the sureties on his official bond are liable in a civil action for damages arising from the intentional or negligent shooting of a misdemeanant who flees to avoid arrest. The officer owes to the fugitive the duty to exercise care and precaution not to injure him. He must not intentionally shoot a misdemeanant who is a fugitive, nor must he discharge a firearm while in pursuit, in such a manner as to cause such fugitive injury.

It is claimed by appellees that the issue of the liability in this case is narrowed by the pleadings. They, in support of this claim, refer to the following allegation in the declaration: "Then and there negligently, carelessly, willfully, intentionally, wrongfully, and unjustifiably, fired his pistol at and toward the said Frank Johnston, and the ball from the pistol so fired by the said W. W. Cunningham struck and instantly killed him, the said Frank Johnston." Their argument is, in effect, that the proof must show that the sheriff pointed and aimed his pistol directly at the deceased when he fired; and that they would be relieved of liability in the case, as made by the pleadings, if it is established that he fired to the side, even though the ball thus fired struck and caused the death. We consider this view of the case quite too narrow. This suit is to recover for the death of Frank Johnston resulting from the firing of a pistol by the sheriff. In order to get the gist of the cause of action, we make a more extended quotation from the declaration: "Plaintiff further avers that the said W. W. Cunningham, while sheriff as aforesaid, did not faithfully perform and discharge all the duties of the said office of sheriff and all acts and things required by law, or incident to the said office, as required by law, or incident to the said office, as required by law and the obligations of his said official bond; but, to the contrary, not

regarding his duty as such sheriff as aforesaid and plaintiff's rights, for the use aforesaid, did on or about the 18th day of September, 1910, at Piney Grove Church in said county and state and while acting as said sheriff, and in the course of his duty as such, attempted to arrest the said Frank Johnston, on information that he, the said Frank Johnston, was then and there disturbing public worship, that in attempting to arrest the said Frank Johnston he went towards him and commanded him to halt, when the said Frank Johnston turned and ran away in attempting to avoid arrest, when the said W. W. Cunningham, in attempting to make the arrest as aforesaid, then and there negligently, carelessly, recklessly, willfully, intentionally, wrongfully, and unjustifiably fired his pistol at and towards the said Frank Johnston, and the ball from the pistol so fired by the said W. W. Cunningham struck and instantly killed him, the said Frank Johnston."

It will be seen that it is charged that the sheriff failed to faithfully perform the duties of his office, and that, disregarding such duties, did in his attempt to arrest Johnston for the offense of disturbing public worship, negligently, etc., fire his pistol, the ball from which struck and killed Johnston. The gravamen of the statement of the cause of action is the officer's negligence in making arrest whereby deceased lost his life.

We cannot see that the words "at and towards" have the effect of narrowing the charge in the declaration of liability, as contended. These words have a some what indefinite meaning. In the Century Dictionary "at" is described as "a preposition of extremely various use." It is therein said that according to its context it is equivalent to "near, about, under, over, toward." The same dictionary defines "toward" as meaning "in the direction of." Anderson's Law Dictionary says the word "at" "is somewhat indefinite." A statute of Indiana made the pointing of a firearm "at or toward any other

person" an offense. In the case of *Lange* v. *State*, 95 Ind. 114, it was held that the pointing of a gun at the door of a dwelling wherein the person threatened was a sufficient proof that the gun was pointed "at or toward." The court said, "The word 'toward' is of very comprehensive signification, for it means, 'in the direction of.'" The general significance of these words is controlled by the context. This is so in the case at bar. The charge against the sheriff is his failure in his official duties, consisting of his improper use and discharge of a firearm. It is admitted that he fired his pistol and that the ball therefrom struck and killed Johnston. The ball went out of the muzzle of the weapon and went into the head of the unfortunate youth. The ball was going in the direction of its victim when it struck. The sheriff, when asked by his own counsel on direct examination, "Did you shoot at him?" answered, "Yes." He evidently understood "at" to mean in the general direction of.

The proof in this case clearly establishes that the sheriff fired his pistol willfully and intentionally, and his act in so doing amounted to negligence. The explanation of counsel for appellee that the ball fired up and to the right struck a twig glancingly which diverted it to the left, where it struck another twig and then, glancing downward, went into Johnston's head, is not in keeping with the reasonable and ordinary view of the matter. We must bear in mind that the sheriff was shooting with a modern pistol of high power, the ball from which would have easily gone through any twig of average size; and we should also keep in mind that the wound did not show that the ball was in any manner affected by having struck an object glancingly. On the other hand, a round bullet hole is shown.

However, it is our view of the case that appellees should be held liable because of the negligent, careless, reckless, willful, intentional, wrongful, and unjustifiable discharge by the sheriff of his pistol while he was in pur-

suit of the deceased, who had only committed a misdemeanor.

The highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous, and in using them extraordinary care should be exercised to prevent injury to others. We quote from Cooley on Torts (3d Ed), p. 1232, as follows: "A high degree of care is necessary in the use or manipulation of loaded weapons in the presence or vicinity of other persons, and where injury results from a failure to exercise such care the defendant is liable." We take the following rule from Barrows on Negligence, p. 367: "The bearer of loaded firearms is bound to exercise the utmost diligence in their handling and he is liable for any injury caused by their discharge, unless it appear that he was entirely without fault." We do not find that the sheriff was exercising the degree of care required by law. He has failed to show that he was without fault. He was running after the deceased, a youth charged only with disturbing the peace, through the woods and over uneven ground; his drawing and firing his pistol, under the circumstances as shown by the proof in this case, was indeed reckless and careless.

The evidence discloses that there is a custom among officers to fire their pistols when pursuing fugitives, even where they are misdemeanants, as a ruse to prevent their further flight. We unqualifiedly condemn this practice of the reckless use of firearms. Officers should make all reasonable efforts to apprehend criminals; but this duty does not justify the use of firearms, except in the cases authorized by law. Officers, as well as other persons, should have a true appreciation of the value of a human life.

The peremptory instruction to find for the plaintiffs should have been given by the trial court.

Reversed and remanded.

EUGENE JACKSON v. STATE.

[65 South. 123.]

INTOXICATING LIQUORS. *Offenses. Evidence.*

The proof of possession of liquors, without proof evidencing the purpose of selling or giving away the same in violation of law, is not sufficient for conviction.

APPEAL from the circuit court of Harrison county.

HON. J. I. BALLINGER, Judge.

Eugene Jackson, was convicted of unlawful selling of liquors and appeals.

The facts are sufficiently stated in the opinion of the court.

Neville & Morse, for appellant.

The crime of keeping intoxicating liquors for sale, is composed of two separate and distinct elements: first, the physical act of keeping the liquor; and second, the mental intent to sell the liquor. The first was proven, but the second was not. This court has repeatedly held, by a long line of decisions, that the mere possession of any quantity of intoxicating liquor does not raise any presumption as to the guilt of the accused. See cases of *State* v. *Stansbury,* 98 Miss. 406;*McComb City* v. *Hill,* 100 Miss. 193; *Byrd* v. *The City of Hazlehurst,* 101 Miss. 57, and many others. Instructions given at the request of the state should have been refused, because there was no evidence to support them. *Billis* v. *State,* 7 So. 390.

Ross A. Collins, attorney-general, for the state.

The question of whether possession alone is sufficient to convict of the crime of keeping liquors for sale, has been decided by this honorable court in the cases of *State*

v. *Stansbury*, 98 Miss. 406; *McComb City* v. *Hill*, 100 Miss. 193; *Byrd* v. *City of Hazlehurst*, 101 Miss. 57. These cases seem to uphold the contention of the defendant in this case and we, therefore, submit the case to the consideration of this honorable court.

REED, J., delivered the opinion of the court.

The affidavit, made in the court of a justice of the peace against appellant, charges that he "did unlawfully keep intoxicating liquors for sale." The evidence shows that he had such liquors in his possession, but fails to show that he kept the liquors for sale. The proof of possession of liquors, without proof evidencing the purpose of selling or giving away the same in violation of law, is not sufficient for conviction, under the holding of this court in the cases of *Stansbury* v. *State*, 98 Miss. 406, 53 So. 783, *McComb City* v. *Hill*, 100 Miss. 193, 56 So. 346, 39 L. R. A. (N. S.), 534, and *Byrd* v. *City of* Hazlehurst, 101 Miss. 57, 57 So. 360.

Reversed and remanded.

ARCH PITMAN v. STATE.

[65 South. 123.]

INDICTMENT. *Form. Unlawful. Criminal law. Sufficiency of affidavit. Objection in lower court.*

An indictment for carrying concealed weapons which fails to charge that the carrying was "unlawful" is fatally defective and since on account of the absence of such an allegation, no crime was charged, an objection thereto may be interposed for the first time in the supreme court.

APPEAL from the circuit court of Lawrence county. HON. A. E. WETHERSBY, Judge.

Arch Pitman was convicted of carrying concealed weapons and appeals.

The affidavit upon which he was convicted is in the following words, to wit: "Personally appeared before me the undersigned, an acting justice of the peace in and for district No. 1, of Lawrence county and state of Mississippi, L. R. Roberts, who makes affidavit (on information and belief) that Arch Pitman did on or about the 15th day of June, 1913, in said district No. 1, of said county and state, carry a weapon concealed, to wit, a pistol, against the peace and dignity of the state of Mississippi."

J. C. Oakes, for appellant.

Taking the first and second assigned errors together, it is manifest that the affidavit is void as charging no offense, and if the affidavit, upon which the prosecution rests, is void, the proceedings, had by virtue of the affidavit, are also void. The trial, the judgment and sentence are void. "It is entirely lawful to carry a pistol (concealed) in some instances and the failure of the affidavit to charge that it was unlawfully done is a fatal defect. *Jordan* v. *State,* 39 So. 895.

The state no doubt could have amended the affidavit if application had been made to the court for that purpose; but no such application was made. Code 1906, sec. 1511.

The objection to this affidavit is not of form but of substance. To charge that the act was unlawfully done is essentially the very essence of the offense, and unless so charged, the affidavit is void as charging no offense, and a judgment and sentence of the law could not follow upon a conviction had under it. A verdict of a jury does nothing more than certify the facts charged, and, if these do not show the party guilty, he cannot be considered to have violated the statute. *Norton* v. *State,* 16 So. 264.

The insufficency of the affidavit is not cured by verdict nor by appellant's failure to take advantage of the in-

sufficiency by demurrer before verdict. His is a constitutional right and cannot be waived, and neither section 1413 nor section 1426 have any application here. Where no offense is charged in the affidavit, advantage may be taken in the supreme court for the first time. *Norton* v. *State,* 16 So. 246, *Newcomb* v. *State,* 37 Miss. 383.

Geo H. Ethridge, assistant attorney general, for the state.

There was no demurrer filed to the affidavit in this case and under section 1426 of the Code all charges to the indictment appearing on its face shall be taken by demurrer and not otherwise before the jury to be empanelled in the case and if any formal defect should be found it may be forthwith amended. It was the duty of the defendant, if he desired to raise the sufficiency, to have raised the question at the proper time.

Under section 1511 it is provided that when an appeal is presented to the circuit court in any criminal case on the judgment of sentence of the justice court, it shall be permissible to amend the affidavit or proceedings so as to prove the merit of the case fairly. In the statute of joefail the verdict cured all defects in the affidavit.

Under section 4936 of the Code, this court cannot reverse, in this case, where the proceeding was not questioned before the verdict in the court below was given, or the defendant be made to sit by and go to trial on an amendable affidavit, and at the end of the trial, avoid the conviction because the instrument was not amended, as it may have been amended if the attention of the court had been called to it. In the case of *Jorden* v. *State,* a demurrer was interposed and the court held that it was well done, that the word unlawfully should have been changed.

There is one phase of this question that I desire to call to the consideration of the court, that seems not to

have been considered in the *Jordan case.* It is, that the offense of carrying concealed weapons is set forth in a seperate section and is expressly provided for in section 1105, that the burden of proving the offense or the circumstances which would make the carrying of concealed weapons unlawful, is placed upon the defendant. Wherever the exceptions are separate or contained in a separate statute their existence did not have to be negative in the indictment if it was sustained, or the adverse provided for, in the same statute which denounces the defendant, then the district attorney or prosecutor must negative such defenses by proper allegations. Where, however, the defenses are contained in separate statutes and the state does not have to place any allegations that would show or negative the idea that the carrying was a lawful carrying, when the statute places the burden to establish the fact to show that it was a lawful carrying, it is the duty of the defendant to raise such question by proper plea.

Section 1103, Code 1906, makes the carrying of concealed weapons, wholly or partially concealed, a misdemeanor. This section itself has no condition in it which would show that any person under any circumstances is allowed to carry any particular weapon concealed. I desire to especially call the attention of the court to this fact for the purpose of asking for a modification of the rule of the *Jordan case,* if that ruling, as made in that case, is broad enough to cover this case, and I further call to your attention that section of the Code, 1426, that requires all defects to be raised by demurrer. It is competent for the state to say, through its allegations, how the defences may be raised. Certainly a party may waive a right of any kind in a charge of misdemeanor. If he desires to avail himself of a demurrer, he would easily have done so. An amendable defect, which has been called to the court's attention, will not be cured by a verdict. It is well known that pleadings before a justice of the peace are not expected to be accurate.

The appellant did not defend on the ground that he had a legal right to carry a weapon and the legality of carrying concealed weapons is not under dispute in this record and for that reason there can be no reason for holding that the failure to do this was error. The appellant denied the fact that he carried concealed weapons and the mind of the trial judge and the jury was centered upon the fact as to whether or not he carried it concealed.

I respectfully submit that the case should be affirmed.

SMITH, C. J., delivered the opinion of the court.

The failure of the affidavit to charge that the weapon was carried concealed "unlawfully" is a fatal defect. *Jordan* v. *State,* 87 Miss. 170, 39 So. 895.

Since, on account of the absence of such an allegation, no crime at all was charged, an objection thereto may be interposed for the first time in this court. *Newcomb* v. *State,* 37 Miss. 383.

Reversed and remanded.

FELIX MOSLEY v. STATE.

[65 South. 124.]

INTOXICATING LIQUORS. *Illegal sale. Admissibility of evidence.*

In a prosecution for the unlawful sale of liquors, where the state witnesses did not definitely locate the date of the alleged sale, and both of them testified that they only obtained the liquor from defendant once, the court should have permitted the defendant to introduce evidence that the sale occurred in another county.

APPEAL from the circuit court of Lafayette county.

HON. H. K. MAHON, Judge.

Felix Mosley was convicted of the unlawful sale of liquor and appeals.

Appellant was convicted of the unlawful sale of intoxicating liquors. The state introduced two witnesses, Brown and Moore, who testified that only one sale was made to them, and that the whisky was in a quart bottle, and that each of said witnesses paid appellant the sum of seventy-five cents, and that the transaction occurred on a road leading north from Water Valley into Lafayette county. In locating the place, however, the witnesses placed the sale at points about a quarter of a mile apart.

The defendant testified that the only transaction he had ever had with the state's witnesses occurred in Yalobusha county, when he delivered to Moore, who was with Brown at the time, a quart of whisky, whch formed part of an order which he and Moore had sent in together, and which had been paid for at the time it was ordered; that this transaction occurred in the presence of Arthur Cooper and Ed Henry, and appellant offered them as witnesses to substantiate his testimony. The court declined to permit them to testify, and on appeal this is assigned as an error.

R. F. Kimmons, for appellant.

Let us briefly review the testimony. Hubert Moore and George Brown, the two state witnesses (and so does the defendant) say that there never was, at any time or place, but the one transaction between the defendant and the state witnesses, or either of them, in which any whisky or intoxicating liquor was delivered by defendant. It is true the state's witnesses say, that the transaction took place at a different time, but they themselves differ as to the time and at a different place (they themselves differ as to the place), from that testified to by the defendant, but they all say that this transaction took place on the same road and on a stretch of road something like a mile and a half long. Then if it be true that there was but the one liquor transaction, can it be said with any fairness or justice, that the defendant shall be deprived of showing to the jury his version of the affair?

The court held in the case of *Compton* v. *State,* 101 Miss. 303, *Page* v. *State,* 59 So. 884, and *Dancler* v. *State,* 61 So. 305, that under the state of facts set forth in the testimony of the defendant and his witnesses that no conviction for the sale of whisky could be upheld, and if this be true, why should the defendant be denied the privilege of showing what the real facts were. Certainly it was peculiarly within the province of a jury to say whether or not E. F. Henry, Arthur Cooper, and the defendant were telling the truth about this transaction or whether Hubert Moore and George Brown were telling the truth.

Ross A. Collins, attorney-general, for the state.

It was perfectly proper for the court to exclude the testimony of E. F. Henry and Arthur Cooper in regard to an entirely different whisky transaction. It is an elementary principle of law that a person charged with crime cannot be tried upon several distinct and separate charges. Defendant was charged with selling whisky in Lafayette county. Evidence of another whisky transaction in Yallowbusha county was immaterial and irrelevant and the only results of the admission of this evidence would have been to mislead the jury. Defendant was not denied the right to show what the real facts of the case were, but the testimony of witnesses for defendant was rightly confined to the specific offense charged. This well-settled rule of criminal procedure is announced in the cases of *Morris* v. *State,* 8 S. & M. 762; *Whitelock* v. *State,* 6 So. 237, and *Bailey* v. *State,* 67 Miss. 333.

SMITH, C. J., delivered the opinion of the court.

Since the state's witnesses did not definitely locate the date of the alleged sale, and since both of them testified that they only obtained whisky from appellant once, the court should have permitted the testimony of Arthur Cooper and Ed Henry to go to the jury.

Reversed and remanded.

T. F. SAXON v. TOWN OF HOULKA.

[65 South. 124.]

1. MUNICIPAL CORPORATION. *Defective streets. Negligence.*

A town is liable to a traveler in damages for injuries caused by being thrown from his buggy by a wheel falling into a hole in the street, where the officials of the town knew of the defective condition of the street, either by reason of driving over it or by having their business place near it, in such case the town officials are negligent in permitting the street to remain in a defective condition.

2. SAME.

A traveler who uses a street in the ordinary way is not guilty of a failure to exercise proper care and diligence in driving over a defective part of the street, even though he knows it is not in general good condition, but does not know of a hole therein which is covered with water and mud.

APPEAL from the circuit court of Chickasaw county. HON. H. F. MAHON, Judge.

Suit by T. F. Saxon against the town of Houlka. From a judgment for the defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Joe H. Ford, for appellant.

Counsel for appellee gives briefly four reasons why he contends this case should be affirmed. I shall make a few observations in reply taking them up serially. 1. The first he gives is that appellant knew that the street he was traveling at the time of the injury, was in a defective condition and was very dangerous. I submit to the court that the record does not support this statement that he knew it was very dangerous. The record shows, as pointed out in my orginal brief, that he knew that it was defective in the sense that there was a mudhole there but he denied, from start to finish, that he

knew there was any danger lurking there. In fact, it was not contended, at the trial below, that appellant knew of the danger, but that knowing of a defect in the street, he must use extraordinary care to avoid the defect or any possible danger resulting from any such defect, disregarding entirely the well-settled rule of law that plaintiff was only required to use ordinary care commensurate with his knowledge of the defect. He knew nothing on earth about the existence of the dangerous trap into which he fell and could not see it with his natural eye.

2. It was not contended, for one moment in the trial of this case in the court below that plaintiff was not exercising ordinary care at the time he sustained the injury complained of, but simply that the law required him to use extraordinary care where he knew of the defect, whether he knew of its dangerous character or not, and the court excluded the testimony and dismissed the case, on the specific ground that, knowing there was a defect in the street at this place, he did not show, from the testimony, that he used extraordinary care to avoid possible danger. Counsel cites the case of *Vicksburg* v. *Hennessy*, 54 Miss. 391, to save his case from reversal. That case is not in point here because there it was shown that the city had provided a safe means of avoiding danger to a traveler of its street, and that Hennessy, knowing of the means so provided, neglected to use it and was injured in consequence of such failure. Such is not the case here, for it is shown that, although this danger had existed for months before the injury, and that it was well known to the town authorities, they had persistently failed, and even refused, to have the defect repaired, or to provide any means by which the public could avoid it in traveling until after the injury, when they made haste to perform their duty of which they had been so long neglectful.

3. Counsel seeks to perpetrate, upon this court, the huge joke that plaintiff cannot recover because proof was

not introduced to show that the town of Houlka is an incorporated municipality. That was not an issue in the lower court at all; the defendant pleaded to the declaration as such. The proof shows they had a mayor and board of aldermen. The last witness introduced testified that he was its present mayor; the proof shows that W. T. Turner was the mayor of the town at the time the injury was sustained and had, himself, narrowly escaped a serious accident in this same place in the street just a few days before the plaintiff sustained his injury. All the proof shows that the injury was sustained by plaintiff while traveling on a public street of the "town of Houlka." It was not necessary that plaintiff procure the proclamation of the govenor to be introduced to show that it was a municipal corporation, or to offer any other evidence to that effect, where there was no such issue involved in the case. That fact was charged in the declaration and not denied by defendant but was, in fact, confessed by it when it pleaded to the declaration in that capacity. However, if proof was necessary, on the trial, to show that it was a municipality, undoubtedly in this case, it was shown.

4. It was shown that the defect and dangerous character of the street, at the place where this injury was sustained, had existed for some months and that the mayor of the town, just a few days before this injury, had fallen into the very hole the plaintiff fell into, and barely escaped a similar misfortune. It was not for one moment contended by the appellee in the court below that this dangerous condition of the street was unknown to the officials of the town. The town board had been applied to to have the place fixed so that it would be passable and safe. The case of *Cohea* v. *Coffeeville,* 69 Miss. 561, cited by counsel, cannot save him, for two reasons: First, it was shown in this case that the defect and dangerous condition was known to the town board and was also of a notorious character;

second, in that case the question was left for the determination of the jury which decided adversely to Cohen. The mere fact that the hole, into which plaintiff fell, was covered with mud and water and was a hidden defect, did not relieve the town from liability for the injury. Not only is the town liable for such defects where they are known to it, but they must exercise ordinary care to discover such. It was held in the case of *Nesbitt* v. *Greenville,* 69 Miss. 22, that "proper repairs, from time to time, are as much the duty of the city as a safe structure originally. Inseparably connected with this statement is another, viz.: that a municipality is liable for injury resulting from its defective structures where, by reasonable diligence, it might have acquired knowledge of such defect. The common knowledge of mankind is chargeable to a municipality also. The knowledge of the action of the elements on structures of wood, and on the liability of timber to decay under certain conditions, is to be attributed to a municipality just as to natural persons. The duty of a municipality to exercise ordinary care to detect such natural decay and to guard against injuries therefrom, follows necessarily." In the case at bar it was a question for the jury to say whether the municipal authorities had knowledge of the defective and dangerous condition of this street, which was denied, and whether they should have, by the exercise of reasonable diligence, known thereof.

In my view of this case, none of the reasons urged by counsel for appellee can save this case from reversal on the record here, and I respectfully submit the case.

R. H. Knox, for appellee.

This case should be affirmed for the following reasons, to wit: First, because the appellant knew that the so-called street, upon which he was traveling, was in a defective condition, and very dangerous; second, because, having knowledge of the defective condition of the so-

called street, at this particular point, he attempted to cross said defective portion of same, without exercising ordinary care, taking his testimony and that of his star witness upon the "house-top" as true. *Birdson* v. *Town of Mendenhall,* 97 Miss. 544, 52 So. 795; *Vicksburg* v. *Hennessy,* 54 Miss. 391; third, because it is not shown whether or not the town of Houlka is an incorporated municipality, and that the place where Saxon claims to have been injured was upon a public street in any municipality; fourth, because it is not shown how long the particular hole, in which Saxon claims to have been injured, was dangerous, if dangerous at all. Therefore, if covered with water and mud, it was a hidden defect for which no one is liable.

I, therefore, respectfully submit that the peremptory instruction, given by the court upon the trial of this cause, was eminently correct, and the same should be affirmed.

REED, J., delivered the opinion of the court.

T. F. Saxon was driving along a street in the town of Houlka. While going through a place in the street covered by water, a front wheel of his buggy dropped into a hole, and he was thrown out with some force. He sustained painful injuries, one or two of his ribs having been broken, and he brought suit for damages against the town. Upon the trial, at the end of the introduction of his evidence, the court sustained a motion to exclude the testimony and directed a verdict in favor of the town.

The hole, into which the buggy fell, was covered with mud and water and could not be seen. Mr. Saxon knew that the street was not in general good condition at the point where he was injured. He did not however know of the existence of the hole, for it was concealed. He was not aware of the dangerous condition of the street because of the hidden hole, and that it was unsafe for travel. The street was open for general use.

It is shown by the testimony that the town officials knew of the defective condition of the street. The mayor had special knowledge of it, by reason of an experience in driving over it a few days prior to Mr. Saxon's fall. The aldermen had their places of business near to the defective place. Application had been made to the municipal board for the work of repairing it, and it was repaired just after the injury. The town authorities should not have allowed this street to get into such defective condition.

We do not see, from the record, that Mr. Saxon failed to exercise proper care and diligence in driving over the defective part of the street. He was using the street in the ordinary way, and he had a right to so use it. *Pascagoula* v. *Kirkwood,* 86 Miss. 630, 38 So. 547; *Birdsong* v. *Mendenhall,* 97 Miss. 544, 52 So. 795.

The court erred in excluding appellant's testimony. This case should have gone to the jury.

Reversed.

WESLEY ROUNDTREE v. STATE.

[65 South. 125.]

CRIMINAL LAW. *New trial. Newly discovered evidence. Confession of another.*

Where a defendant convicted of crime made a motion for a new trial, on the ground of newly discovered evidence, and supported his motion by affidavits that another person had confessed that he committed the crime for which the defendant had been convicted and had pleaded guilty to the same, the motion should be sustained.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Wesley Roundtree was convicted of obtaining goods under false pretense and made a motion for a new trial on the ground of newly discovered evidence. From an order overruling the motion he appeals.

Appellant was convicted of obtaining goods under false pretenses. After conviction he made a motion for a new trial, one ground of which is as follows: "The defendant says, further, that he should have a new trial, because since the trial in which he was convicted he has discovered new and material testimony, and such as would very likely change the result of the case, to wit: That another person, Jim Lyons, a few days ago admitted and confessed that he committed the identical crime of which defendant was convicted, and that he pleaded guilty to same before a justice of the peace, Hon. Luther Smith, of district No. 5 of Lincoln county." Appellant made affidavit in support of his motion to the effect that he had learned the facts set out in this motion after conviction, and his attorney made a similar affidavit. An affidavit was also made and filed by a man named Case, setting up that "since the date of the conviction of Wesley Roundtree, Jim Lyons confessed and admitted to him (affiant) that he (Lyons) committed the crime of which Roundtree was convicted, and that in a new trial he would testify that such acknowledgment was made to him." The court overruled the motion for a new trial, and an appeal was taken.

Jas. F. Noble, for appellant.

The most important thing to be considered is the confession of Jim Lyons and his plea of guilty. The motion for new trial properly supported by affidavits, and upon which testimony was introduced, sets up this ground. Lyons confessed to the commission of the identical crime of which Roundtree was convicted. Lyons testified that he plead guilty because he understood Saxon would prosecute him and because he thought it best

for him to do so in order to get out of it. The state used Jim Lyons as its witness, and his testimony was straightforward and bears the mark of truth. And every particle of evidence introduced on the motion for new trial strengthens the defendant's contention.

The newly discovered evidence in support of the motion for new trial is material and vital. It is more than cumulative, and does more than impeach a witness. It goes to the very heart of the case, and is of such a nature as in all probability will bring about another and different verdict. I refer the court to the following cases: *Bates* v. *State,* 32 So. 915; *Weathersby* v. *State,* 95 Miss. 300; *McCleary* v. *State,* 52 So. 796; *Bucker* v. *State,* 81 Miss. 140; *White* v. *State,* 45 So. 611; *Watson* v. *State,* 96 Miss. 369; *Barretine* v. *State,* 51 So. 275. I submit that these cases sustain my contention.

Geo. H. Ethridge, assistant attorney-general, for the state.

There is nothing in this record, looking at it from a legal view, that would entitle the appellant to a new trial. It appears abundantly from the record that there had been abundant opportunity for the defendant to learn all the facts. The jury found a verdict that was amply supported by the testimony and should not be now disturbed.

SMITH, C. J., delivered the opinion of the court.

The motion for a new trial should have been sustained, so that appellant might obtain the benefit of the newly discovered testimony, which, if true, will entitle him to an acquittal.

Reversed and remanded.

GLOBE RUTGERS FIRE INSURANCE CO. v. JOHN SAYLE.

[65 South. 125.]

1. INSURANCE. *Service of process on foreign corporation. Proof of appointment of attorney in fact. Evidence. Code* 1906, *section* 2606. *Appointment of agent. Judgment. Default. Sufficiency of record recitals.*

Under Code 1906, section 2606, so providing, the appointment of the commissioner of insurance as attorney in fact for a foreign insurance company for the service of process, can be proved only by a certified copy of such appointment.

2. EVIDENCE. *Judicial notice. Appointment of agent.*

In the absence of a certified copy of the instrument constituting and appointing the commissioner of insurance its "true and lawful attorney," there is no way by which the court could judicially know that the commissioner was authorized to acknowledge service for an insurance company.

3. SAME.

To sustain a judgment by default, it must affirmatively appear that the defendant was served with process.

4. JUDGMENT. *Judgment by default. Recitals.*

Recitals in a judgment by default that the court found that the defendant had been duly served, will not support the judgment, when the record shows that the service was insufficient.

APPEAL from the circuit court of Tallahatchie county. HON. N. A. TAYLOR, Judge.

Suit by John Sayle against the Globe Rutgers Fire Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Hirsh, Dent & Landau, for appellant.

First, there was no service on appellant in court below. The summons issued by the deputy circuit clerk is bad, if not void, for the want of the seal of the court. *John Pharis* v. *Uriah Conner,* 3 S. & M. 87.

No service was had on this irregular or void summons on the appellant in the court below, and, therefore, the judgment entered is irregular and void. A judgment, entered by default against a party who has not been served with process and who has not appeared in the action, is irregular and void. 32 Cyc. 737; *Duncan* v. *Gerdine,* 59 Miss. 550; *Prentiss* v. *Mellen,* 1 S. & M. 521.

The summons was directed to the sheriff of Tallahatchie county. It was never received by him and no returns were ever made on it by him. The Code of 1906, section 3932, provides: In suits against insurance companies, the process may be served on any agent of the defendant, or sent to any county in which the office or principal place of business may be located, and there served as herein directed and authorized; or may be served on any one of the foregoing officers of such corporation or company and upon the secretary, cashier, treasurer, clerk, depot agent, attorney or any other officer or agent of such receiver or receivers, or upon them in person. When any writ or process against such corporation, company, receiver or receivers has been returned executed, the defendant or defendants shall be considered in court, and the action shall proceed as actions against natural persons; and all process and notices to be served upon such companies, corporations, or receivers, may be served as herein directed. There was no service on the defendant under this sction. No return by the sheriff that defendant, or its agent, could be found in Tallahatchie county. There is indeed, nothing in this record to show that summons was ever delivered to the sheriff of Tallahatchie county.

Section 2606 of the Code of 1906 provides: No foreign insurance, indemnity or guaranty company shall be admitted and authorized to do business in this state until it shall, by a duly executed instrument, filed in his office, constitute and appoint the commissioner of insurance, and his legal successor, its true and lawful at-

torney, upon whom all process in any action or legal proceeding against it, which may be served upon its said attorney shall be of the same force and validity as if served on the company, and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state. The service of such process shall be made by leaving a copy of the same in the hands or office of the said commissioner. Copies of such instrument certified by the said commissioner shall be deemed sufficient evidence thereof, as service upon the principal.

There is nothing in this record to show that the appellee had complied with any of the provisions of this section, or that it had appointed the commissioner of insurance of the state of Mississippi, its agent or true and lawful attorney. The certificate or summons, which purports to be a certificate from the insurance commissioner, does not show that the T. M. Henry, whom it appears, made this certificate, is the commissioner of insurance of the state of Mississippi.

Section 2555, Code of 1906, provides: The seal of this department (department of insurance) shall have around the margin thereof the words "commissioner of insurance, Mississippi," with the image of an eagle in the center and thirteen stars over the head of the eagle. Every certificate and other official paper, executed by the commissioner under authority of law and sealed with the said seal of this office, shall be received as evidence in all courts, investigations and proceedings authorized by law, and may be recorded in the same manner and with like effect as a deed; and all copies of paper in the office of the said commissioner certified by him and authenticated by said seal shall be accepted in all matters equally and in like manner as the original.

It will, therefore, be seen that the certificate of T. M. Henry, insurance commissioner, is not sufficient under the above section. There is no seal of the commissioner

of insurance of Mississippi on the certificate of the summons.

We have been unable to find where there is such an officer as "insurance commissioner." The law provides for the creation of the department of insurance, and provides also, for the office of commissioner of insurance, and it provides how his acts may be authenticated under seal, and it provides what the seal shall contain. There was no compliance with this provision as shown by the summons in this record.

Section 2569 of the Code of 1906 provides: When legal process is served upon the commissioner as attorney for a foreign company or order, under the provisions of section 2606, he shall forthwith notify the company or order of such service by letter prepaid and directed to its secretary, or to its resident manager, if any, in the United States, and shall, within two days after such service, forward, in the same manner, a copy of the process served on him to said secretary or manager, or to such persons as may have been previously designated by the company, or order, by written notice filed in the office of the commissioner, as a condition of a valid and effectual service, and of the duty of the commissioner in the premises, the plaintiff in such process shall pay to the commissioner, at the time of service thereof, the sum of two dollars, which the said plaintiff shall recover as taxable cost if he prevails in his suit.

There is nothing in this record to show a compliance with this statute, in order to make it a valid and effectual service. There is nothing to show how summons was served on him or that he notified the company of such service by letter prepaid, directed or addressed to its secretary or to its resident manager, or to such person as may have been previously designated by the company or order, by written notice filed in the office of the commissioner of insurance. There is nothing to show that, as a condition of valid and effectual service, the ap-

pellee paid the commissioner, at the time of the service, the sum of two dollars, as required by the foregoing section.

The certificate of the clerk shows that he sent, by registered mail, to the Globe Rutgers Fire Insurance Company of New York, a true copy of this summons. There is nothing to show, when, where, or to what officer of the company, if any, he sent it. There is nothing to show that summons was ever received by appellant and if it had been received by appellant, this would not have been a compliance with the law with reference to the service of summons of this kind. There is no statutory provision requiring or authorizing the clerk to mail a summons of this kind, and his acts in the premises are void.

A statutory provision requiring the mailing of notice of the suit to the home office of the corporation is not jurisdictional. Where there has been no personal service, such mailing is insufficient to confer jurisdiction, unless consent to such a method of service is made a condition to the doing of business within the state by the corporation. 39 Cyc. 569.

Process of this kind must be executed according to the rules prescribed by the statute and the return of the officer must show the manner in which he executed the process. *Crizer* v. *Gordon,* 41 Miss. 562; *Ezelle* v. *Simpson,* 42 Miss. 516; *Milan* v. *Strickly,* 46 Miss. 724; *Tucker* v. *Byars,* 46 Miss. 551. The official return must, of itself, show clearly that legal and proper service was made, otherwise the judgment is void. *Express Co.* v. *Hunt,* 54 Miss. 664; *Rawkins* v. *Delaney,* 43 Miss. 197; *Hargus* v. *Bowen,* 46 Miss. 72; *Dogan* v. *Barnes,* 76 Miss. 568.

By whom was this summons served on T. M. Henry, "insurance commissioner"? T. M. Henry was insurance commissioner of what? Was T. M. Henry the attorney, in fact, for the defendant company and, if so, what au-

thority did he have? Was summons served on him in accordance with the provisions of section 3932, Code of 1906, or was it served on him in accordance with the provisions of section 2606, Code of 1906, and did he comply with the provisions of section 2555, Code of 1906? These questions cannot be answered from this record, and, therefore, the judgment by default, on the entries on the summons is irregular and void. The return must show affirmatively the facts constituting a valid service. So the return must show that service was upon an officer or agent designated by statute. A return of process upon the agent appointed by a foreign corporation to accept service of process must show that the person served is such agent. The officer should confine himself to a settlement of what he actually does in serving the process and should not state conclusions of law and fact apart from what was done. 32 Cyc. 569.

The fact that there is a recital in the judgment, that the defendant had been duly and legally served with summons and for the length of time required by law, for this cause to be heard and tried, does not make the service legal and effective. This court has passed upon this question in the case of *Watkins Machine and Foundry Company* v. *Cincinnati Rubber Mfg. Co.*, 96 Miss. 611.

Woods & Kuykendall, for appellee.

For all that this record shows, the defendant may, through one of its general offices, or by counsel, without plea, have appeared in open court and made the written tender, which amounts to a general appearance. The only mode of appearance in a cause pending is not by a written plea. *Byrne, Vance and Company* v. *Jefferies,* 38 Miss. 540.

Service of process in this case is acknowledged by T. M. Henry, insurance commissioner, and under *Davis* v. *Jordan,* 5 Howard 255, and *Bacon, et. ux.,* v. *Bevan and*

Company, 44 Miss. 293, this would not have been good without proof of the acknowledgment. So in the absence of a bill of exceptions, this court will presume that the proof of acknowledgment was made. The adjudication of service and the judgment recital as to service involves a mixed question of law and fact and is, therefore, not subject to review by this court in the absence of a bill of exceptions. The evidence and the sufficiency thereof as to the defendant having been served with process, was a matter which the circuit court had power to determine; and, in the absence of evidence showing to the contrary, upon well settled principles, its judgment upon the question must be presumed to be right. *Mark* v. *Horn,* 38 Miss. 102-103; *Cason* v. *Cason,* 31 Miss. 578; *Cannon* v. *Cooper,* 38 Miss. 784. The evidence upon which the court made its adjudication as to service is not necessarily a part of the record, nor required to be shown by it. 38 Miss. 789.

As to the acknowledgment of service by T. M. Henry, insurance commissioner, and the introduction of evidence thereon being proper, we call the attention of the court to the cases of *Davis* v. *Jordan,* 5 Howard 295, and *Harvey* v. *Bostic,* 1 Howard 106. And that the insurance company recognized said service and acted on it, note the judgment recital of appearance by the defendant and the written tender. This court said in *Safforans* v. *Terry,* 12 S. & M. at page 695: Whether publication had or had not been made was a question of fact to be ascertained by evidence; and as the circuit court is a court of general jurisdiction, it is to be presumed from this recital that it had all the evidence before it to enable it to pronounce judgment.

Section 2606, Code of 1906, paragraph 3, in reference to foreign insurance companies says it shall, by a duly executed instrument filed in his office (Insurance Commissioner's), constitute and appoint the Commissioner of Insurance, and his successor, its true and lawful at-

torney, upon whom all process in any action or legal proceeding against it may be served, and therein shall agree, that any process against it, which may be served upon its said attorney, shall be of the same force and validity as if served on the company. The service of such process shall be made by leaving a copy of the same in the hands or office of the said commissioner. Under this section, service on commissioner has the same force and validity as if served on the company, and that being true, we ask if any one would contend that said service would have been invalid if the certificate, which is indorsed on the original summons, had been indorsed therein by the company itself, and not T. M. Henry? The summons may be served by leaving a copy of the same in the office or hands of the commissioner, and the commissioner acknowledged that the summons was served on him as attorney in fact for the company, and as there is no bill of exception showing what was the truth on this point, we must presume that the service was made. At any rate there is nothing in the record which contradicts it and no evidence to the contrary is brought to this court by bill of exceptions. Insurance commissioner is the agent of the appellant and not the agent of appellee and the appellee is not chargable with any delinquencies on the part of the commissioner if any there be. However, the commissioner states that he mailed a coppy of the summons to his master, the company at its home office. As the greater always includes the lesser, we say that when he mailed a copy of the summons to the company, the secretary of the company was necessarily included. But, however that may be, section 2569, Code of 1906, says that failure of the commissioner to notify the company shall not effect the validity of such service.

There is nothing in the record affirmatively disproving the judgment recital that, The Globe Rutgers Fire Insurance Company has been duly and legally served

with summons in this cause in the manner and for the time required by law for this cause to be heard and tried at this time.

Any action on the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court will amount to a general appearance. 3 Cyc., page 504, sec. 5. The question of tender was a mixed question of law and fact and the adjudication of that fact will not be disturbed in the absence of a bill of exceptions showing what transpired on the trial of the cause. The adjudication will be presumed to be correct. Can we indulge in speculation as to what was in the written tender, or as to the evidence before the circuit court as to power or authority of Leblanc and Bailey, Ltd., to act for the insurance company? Most assuredly not, because we do not know, and cannot know, what was before the lower court touching these matters. There is an utter absence of a bill of exceptions and the judgment recital touching these matters must be presumed to be correct. We submit that if the tender had been incorporated into the record it would be no more a part of the record than is the certificate of the clerk which has been copied into the record, pretending to certify about a tender. The certificate of the clerk has absolutely no business in this record and the same will not be noticed by this court. *Martin* v. *Harvey,* 54 Miss. 685. The recital is that the defendant made a written tender. The fact that a tender was made by Lablanc and Bailey, Ltd., on behalf of the insurance company does not, in the remotest degree, show a contradiction or a falsification of the solemn judgment recital that the defendant had come into the circuit court and made a written tender. It is but an unwarranted supposition, or assumption of counsel for appellant, to claim that the judgment recital on the question of tender has reference to the tender made by Leblanc and Bailey, Ltd. Whatever is mere evidence in the court below, though it be a rec-

ord, is no part of the record of that trial, unless made so by a bill of exceptions. And hence, papers or other evidence, heard and read on the trial of the cause in the circuit court are no part of the record of the proceedings in that court, and will not be noticed in the supreme court. And this is so, though such papers or evidence be copied into the transcript as a part of the record, by the clerk. To constitute them a part of the record they must be incorporated in a bill of exceptions. The certificate of the clerk is utterly out of place in this record. 30 Miss. 129. What is or is not a part of the record, is a matter to be judicially determined by this court in the exercise of its appellate jurisdiction. *Portwood, et al.* v. *Zeld and Silverberg et al.*, 72 Miss. 542.

If we stood alone in the tender of Leblanc and Bailey, Ltd., which we do not, what would be the attitude of the case? In the absence from the record of the written tender, and in the absence of a contrary record showing on the one side and the judgment recital on the other, would it be violent presumption to say that Leblanc and Bailey, Ltd., were the duly and legally authorized agents of the insurance company? Messrs. Hirsch, Dent and Landau, we assume, are authorized, in fact we know they are authorized, to prosecute this appeal on behalf of the appellant, but should occasion arise, we would not be surprised to have the Globe and Rutgers Fire Insurance Company demand proof of that fact. For ways that are dark and tricks that are vain, beware of the heathen Chinee, for his ways are peculiar.

COOK, J., delivered the opinion of the court.

Appellee filed suit against appellant upon an insurance policy issued by it, covering an automobile, averring that the automobile had been damaged by fire, and asking judgment against appellant for the amount of the damages. The defendant failing to appear and plead to the declaration a judgment by default was rendered,

and a jury of inquiry impaneled to assess the damages. Upon the verdict of the jury therefore a judgment for five-hundred twenty-two dollars and fifty cents was entered. From that judgment this appeal is prosecuted.

When the declaration was filed a summons was issued, which, with the indorsements thereon, is as follows: "Circuit Court Summons. The State of Mississippi, To the Sheriff of Tallahatchie County, Greeting: We command you to summon Globe Rutgers Fire Insurance Co., Inc., if to be found in your county, personally to appear before the judge of the circuit court of said county, at a term thereof, to be begun and holden for the county aforesaid, at the courthouse thereof, in the town of Charleston on the first Monday of December, A. D. 1912, then and there to answer the complaint against it in said court by John Sayle. Herein fail not, and have then and there this writ, with your return indorsed thereon, showing how you have executed the same. Witness my hand as clerk, with the seal of said court hereunto affixed, this, the 5th day of July, A. D., 1912. (Signed) J. P. Dogan, Clerk, by H. H. Wimble, D. C. (Seal.)"

The following indorsements are made on the back of the summons:

"I, J. P. Dogan, clerk, do hereby certify that I mailed a true copy of this writ to the Globe Rutger Fire Ins. Co., New York, and that I received a receipt for same on the 15th day of July 1912. J. P. Dogan, Clerk, by H. H. Wimble, D. C. (Seal)."

"Served on me as attorney in fact for within named company, and copy of summons sent by me to home office of said company this July 26, 1912. T. M. Henry, Ins. Com., by McNair. (Seal.)"

The main controversy here is upon the validity of the return upon the summons. Was the defendant served with process in the manner provided by the law, which would authorize the court to enter a judgment by default?

It is the position of appellee that the acknowledgment of service indorsed on the summons by the commissioner of insurance is sufficient proof that the defendant had complied with the law by appointing the commissioner its attorney in fact according to the provisions of section 2606 of the Code of 1906, and that the acceptance or acknowledgment of service by the commissioner authorized the court to take judicial notice that the commissioner had been appointed attorney in fact of this corporation. The last clause of section 2606 provides how the appointment of the commissioner may be, and we think must be, proven.

In the absence of a certified copy of the instrument constituting and appointing the commissioner of insurance its "true and lawful attorney," there is no way by which the court could judicially know that the commissioner was authorized to acknowledge service. The declaration does not allege that the defendant had executed the statutory power of attorney, and there was no legal evidence before the court that such, in fact, was the case.

To sustain a judgment by default it must affirmatively appear that the defendant was served with process.

It is contended that this appears in the recitals of the judgment itself to the effect that the court found that the defendant had been served with a summons in the manner and for the time required by law. The recital in the judgment would probably be sufficient to uphold the judgment if the record were otherwise silent on the service of summons, but in this case the record discloses just how the service was had, and, this form of service being insufficient to warrant a judgment by default, it thus affirmatively appears that the court had "an erroneous conception of the law." *Watkins Machine Co.* v. *Cincinnati Rubber Co.*, 96 Miss. 611, 52 So. 629. Before a default judgment may be rendered the record must show the service of process on defendant, or upon its attorney in fact. There is no service on the defendant

appearing in the record, and there is nothing in the record to establish that defendant had executed the power of attorney prescribed by the statute. The record also shows the basis for the recitals in the judgment "that said defendant has come into this cause and filed a written tender." The "written tender" appears in the record, and it is subject to the same infirmities as the service of process, and does not support the recital in the judgment.

Reversed and remanded.

J. M. MOORE v. STATE.

[65 South. 126.]

1. CRIMINAL LAW. *Forgery. Elements. Instruments subject to forgery. Report of public schools. Code* 1906, *sections* 4522-4556-4557-4560.

In order that forgery may be committed, the writing alleged to have been forged must be one which, if genuine, might injure another.

2. FORGERY. *Instruments subject to forgery. Report of public school. Code* 1906, *sections* 4497-4522-4556-4557-4560.

Under Code 1906, sections 4497-4522-4556-4557-4560, so providing the only person entitled to receive a certificate for the payment of salary due for teaching school in a school district from the county superintendent of education, are such as have been elected teachers by the trustees of the district or appointed by the superintendent, and a false report of a public school purporting to be signed by one who had neither been elected by the trustees nor appointed, nor contracted with by the superintendent as a teacher of the school, did not authorize the superintendent to issue a pay warrant thereon, and hence though false in fact, and though the superintendent issued a certificate for the payment of salary thereon, it could not be the subject of forgery.

APPEAL from the circuit court of Sunflower county.

HON. MONROE MCCLURG, Judge.

J. M. Moore was convicted of uttering a forged instrument and appeals.

Appellant was indicted for uttering a forged instrument, the language of the indictment being that the defendant "did unlawfully, fraudulently, and feloniously utter and publish as true to one C. T. Bookout, the said C. T. Bookout being then and there the county superintendent of public education of said Sunflower county in said state, a false, forged, and counterfeit instrument; the said instrument in writing being then and there what is commonly known as a report of public school in said county of the tenor and purport and full effect, to wit." The report is set out in full, and is purported to be signed by "Lula A. Moore, Assistant Teacher," and approved by the trustees of said school. Upon receipt of this certificate, the county superintendent issued a pay certificate to appellant, the father of Lula A. Moore, who obtained thereon the sum of twenty-five dollars. It afterwards appeared that said Lula A. Moore had not taught the school in question the length of time set out in said report, and in fact she was not a regularly elected teacher of said school at all. Appellant was convicted and sentenced to the penitentiary for ten years, and appeals.

D. M. Quinn, for appellant.

Counsel for the state quotes isolated statements from the testimony of the alleged trustees, wherein they undertook to show that they were elected as trustees, but the record of their testimony on cross-examination will show that they were not duly elected, qualified and acting trustees as alleged in the indictment, and as required by the school laws of the state of Mississippi, and the testimony of the county superintendent shows that he had no record of the reports of the elections, that he made no appointments of trustees, and therefore, there were no

duly qualified and acting trustees, as alleged in the indictment and as required by the laws of the state, and as held to be essential in the case of *Griffin* v. *State,* 96 Miss. 309, and the testimony of Bookout, county superintendent, further shows that he kept no record as required by law, and that the only record he had of the trustees was the fact that names of certain parties were signed to the monthly school reports when they were presented to him for certificate of payment. In this case the report presented could have had no legal efficacy and was not capable of deceiving even the most credulous, was not such an instrument as could have sustained a charge of forgery for its making, and if the charge of forgery could not have been sustained for the making of a report, it was not such an instrument as is covered by the statute for uttering forgery. Even had the defendant known that the report was false, and there is nothing in the testimony to show that he had such information, but, on the contrary, the testimony shows that he received, through the mail as usual, and thought it a genuine and valid report, still with the information in the hands and at the command of the county superintendent of education, it was not such a report as could have deceived the county superintendent and have defrauded the county, and this would have been true even though the county superintendent had been a weak-minded man, as indicated in the *Smith case,* wherein it is said that the statute against forgery is intended to protect the simple minded.

The testimony further shows that the alleged trustees gave a contract to Lula A. Moore to teach the school. The superintendent's testimony shows that he did not have a contract for Lula A. Moore to teach the school and that he did not appoint Lula A. Moore to teach the school, as he was authorized under the statute to do. Then I submit that it was impossible for him to have been deceived by the report, and the instrument not being such as was capable of deceiving the superintendent and

not being an instrument of any legal efficacy, it could not sustain the charge of uttering and publishing a false report.

The county superintendent further testifies that he thought the writing on the report was of Lula A. Moore, the wife of the defendant, and that it looked like her writing. This should have put him on his guard and should have been a protection to the county, had he taken advantage of the information which it disclosed, and should have put him on his inquiry because he knew that he had no report of her election as teacher and had no appointment of her as he was authorized to do. If the superintendent was not deceived by this report and thought the writing that of the appellant's wife, why should the state be allowed to presume that the appellant knew that the instrument was a forgery, when it was received by him through the mails from a distance of about fifty miles from where the appellant was at work, and his testimony shows that it was the custom of the members of his family to mail their reports to him and that he had no reason to suspect that his wife had not taught the month of school.

When the testimony was closed on the part of the state, the appellant moved to exclude the state's testimony, and when the whole testimony was closed, the appellant asked for a peremptory instruction. The trial judge stated that if the theory of the defense were correct, and in substance, that if it were necessary for the state to show duly elected, qualified and acting trustees, or trustees appointed by the county superintendent, or if it were necessary to show that Lula A. Moore had been elected to teach the school, or appointed by the superintendent to teach the school that the appellant's motion should have been sustained and the peremptory instruction given. How the trial court could harmonize his views with the statute law of the state, counsel for appellant is unable to conceive, and how the trial court could harmonize his

views with the holdings of the supreme court in the *Griffin case, supra,* had he permitted counsel for appellant to present the *Griffin case,* is inconceivable to counsel for appellant.

Counsel for the state cites only one case in support of his contention, to wit: That of *Burgess* v. *State,* 81 Miss. 481, and with the principles there announced, I have no quarrel; in other words, I readily concede that the crime of forgery and crime of uttering forged instruments are distinct offenses under the statute law of the state of Mississippi, but, as indicated above and in my original brief, in order for one to be guilty of uttering a forged instrument, it must be shown to have been forged, must be shown to have been known to the accused to have been a forged instrument, and must have embodied all of the elements of forgery and must have been an instrument capable of deceiving, or, in other words, an instrument of some apparent legal efficacy. If the instrument presented had no legal efficacy, and was not capable of working injury, the courts hold that the party, to whom it was presented cannot shut his eyes to the information which he has at hand, "believe it a naked lie" and then complain.

Counsel cites the *Burgess case* and in reference thereto, I will say that, in the case at bar, the court should have sustained the demurrer, and not having sustained the demurrer, should have sustained the motion to exclude the state's testimony, and should have granted the peremptory instruction, and not have permitted the state to go to the lengths that it did in obtaining the appellant's conviction. As stated in the *Burgess case* on page 485 of 81 Miss. Report: "The fair way is the safe way, and the safe way is the best way in every criminal prosecution. The history of criminal jurisprudence and practice demonstrates generally that, if every one prosecuted for crime were fairly and fully conceded all to which he is entitled, and if all doubtful advantages to the state were

declined, and if adventurous forays into dangerous and unknown fields were shunned, and if beaten paths were heedfully followed, there would be secured as many convictions of the guilty and such convictions would be succeeded by few or no reversals." This was a re-affirmance of a doctrine previously announced by the supreme court of Mississippi. In the case at bar if it had not been necessary for the state to show duly elected, qualified and acting trustees, those allegations would not have been made in the indictment, and having been made, it was necessary for them to have been proven. If these allegations had not been necessary and the proof of same competent, the state would not have undertaken to show that the alleged trustees were the acting trustees of the school. In other words, in order for the superintendent and the county of Sunflower to have been cheated and defrauded, it was necessary for appellant to utter an instrument which in its face, purported to have some legal efficacy, but under the testimony of the superintendent of education, in the case at bar, it is shown that it absolutely had none. It was likewise necessary to allege and prove that Lula A. Moore, the teacher whose name appeared on the instrument alleged to have been fraudulently uttered, being forged, was in fact the duly elected and qualified teacher of the school; otherwise, the instrument alleged to have been uttered could not have been capable of working an injury and could not have been capable of deceiving the county superintendent, and could not have been capable of defrauding the county; whereas, the indictment in the case at bar shows that Lula A. Moore was not the teacher, and the proof shows that the county superintendent knew that she was not the teacher.

Counsel argues that the case of *Griffin* v. *State,* 96 Miss. 309, has no application to the case at bar because the *Griffin case* was based on the crime of forgery, whereas, the case at bar is one for uttering forgery. The *Griffin case,* in referring to section 4563 of the code of 1906, says that

it requires the teacher, at the end of every scholastic month, to make out, from his register, a report, etc., and in referring to the certificate of the trustees, further states such certificate must purport to approve a report in fact made, or purporting to have been made, by a teacher of a public school, etc. Whereas, the indictment in this case shows that Lula A. Moore was not the teacher of the school, for which a report purported to have been made; that she was not in the sense of the *Griffin case* "the teacher of the school" charged with the duty of making such report, because the indictment shows that she was not the teacher of the school. The testimony of the alleged trustees shows that she had been given no authority to teach the school, and the testimony of the superintendent shows that he had not appointed her to teach the school; she was therefore not the teacher of the school and was known to the superintendent, at the time that he issued the pay certificate, not to be the teacher of the school, and the superintendent of education and the county were not cheated and defrauded by the uttering of the instrument, but simply by the inefficiency of the county superintendent, or his lack of attention to duty, and his failure to comply with the plain statute law of the state. It seems to me that the indictment in this case is fatally defective wherein it alleges that Lula A. Moore was not the teacher of the school for the reason that if she was not the teacher of the school, it was the duty of the superintendent not to issue to her pay certificates, and he was the representative of the county and charged with the knowledge that she was not the teacher. As stated in the *Griffin case,* "moreover the persons whose names are forged to such a certificate must be trustees of the public school, and this fact must be alleged and proved. The mere recital of such a fact in the certificate is not sufficient." That was not done in the case at bar, the proof on the contrary showing that the parties whose names were signed to the report were

not the trustees. It is equally as important that the name of the teacher, appearing on the report, must be the teacher of the particular public school, and this fact must be alleged and proved in order to give the report any legal efficacy or make it apparently the duty of the superintendent to issue the pay certificate on its presentation. I am not surprised that the assistant attorney-general dismissed the *Griffin case* with one short sentence, and that he was so limited in his contention that the *Griffin case* does not apply in the case at bar. Had he seriously contended that the *Griffin case* did not apply, his position would have been similar to that of the Roman Augurs, who on account of the knowledge that their pretentions were absurd, and that each Augur knew that the pretentions of each other Augur were absurd, could scarcely look into each other's faces, even while pretending to interpret the will of the gods, without laughter, I apprehend that the supreme court will convince the assistant attorney-general in this case that it is not quite as credulous as the Roman Populace.

Counsel for the state contends that the *Mortimer case*, 82 Miss. 443, is not applicable to the case at bar, for the reason that he says "the presumption was deduced from the indictment that the money was paid for services actually rendered." There is no more reason for such deduction in the *Mortimer case* than there is in the case at bar, and the demurrer makes the point that the indictment should negative the fact that money was actually due to Lula A. Moore for teaching the fifth month of the Goff Public School. Counsel says "the essential element of uttering a false instrument is the misrepresentation." This may be one of the essential elements, but it is certainly not the only, and possibly not the most essential element of the crime of uttering a false and forged instrument. The falsity and forgery must be alleged and proved, and the instrument itself must have legal efficacy.

George H. Etheridge, assistant attorney-general, and *E. H. Green,* associate counsel, for the state.

This indictment is predicated on section 1192 of the Code of 1906, which is as follows: Uttering false instrument, counterfeit coin, etc. Every person who shall be convicted of having uttered or published as true, and with intent to defraud, any forged, altered or counterfeited instrument, or any counterfeit gold or silver coin, the forgery, altering, or counterfeiting of which is hereinbefore declared to be an offense, knowing such instrument or coin to be forged, altered, or counterfeited, shall suffer the punishment herein provided for forgery."

It was held in the case of *Burges* v. *State,* 81 Miss. 482, 33 So. 499, that forgery and uttering a forged or counterfeit instrument were two distinct and separate offenses, therefore the case of *Griffin* v. *State,* 96 Miss. 309, cited by counsel for appellant would have no application to the case at bar, because that case was based entirely upon the crime of forgery. In the *Mortimer case,* 82 Miss. 443, the presumption was deduced from the indictment that the money was paid for services actually rendered. No such presumption can be drawn from the indictment in the case at bar, however, for the indictment specifically alleged that appellant uttered and published as true a counterfeit instrument. This indictment contains every element of the crime charged against appellant. It is set out in the indictment that the instrument was uttered and published as true to C. T. Bookout, county superintendent of education of Sunflower county. That this instrument was false and was known as a report of the public school of said county. The essential element of uttering a false instrument is the misrepresentation and this is fully set out in the indictment. A copy of the false instrument was set out and made a part of the indictment, so the defendant cannot claim that his case was, in any manner, prejudiced by his not having notice of the crime charged against him.

There is no merit whatever to the contention of appellant that the court improperly admitted evidence that was prejudicial to his case. Counsel contends that the testimony in regard to case was erroneously admitted, because the evidence does not show that the report was a true copy of the instrument copied in the indictment. This would not be a fatal variance, because the trustees certainly knew whether they signed a report for the fifth month of the year 1910-1911, as set out in the indictment.

The instructions, given for the defendant, covered every possible legal phase of the case. The jury was instructed fully as to the doctrine of reasonable doubt and as to their duty to find the defendant not guilty if he was not proven guilty beyond a reasonable doubt. Instruction number two refused for defendant, was properly refused because the appellant was charged with uttering a forged report of the school and the section of the Code in regard to separate school districts had no bearing in the case whatever. In reference to the third refused instruction, even if the trustees of the Goff School had neglected their duty in making reports, this fact does not excuse the defendant. In regard to the fourth, fifth, sixth and seventh refused instructions, I respectfully submit that the doctrine of reasonable doubt, which these instructions are based on, was clearly stated in the ninth and tenth instructions given for the defendant.

The two instructions, given for the state could, under no constructions of the law, be held to be erroneous. The first instruction simply states that if the jury believed from the evidence, beyond a reasonable doubt, that the defendant uttered and published, as true, a school report of the Goff School, knowing the same to be false and counterfeit, that it was their duty to find the defendant guilty. The second instruction, in substantially the same form, is given in nearly every criminal case for the state

on the proposition of reasonable doubt, and tells the jury that the doubt must be reasonable and must arise out of the evidence or want of evidence.

There can be no doubt of the guilt of this appellant upon a reading of the record. The fact that he was a man advanced in years can have no possible bearing upon the decision of this case. The sentence of the court in this case cannot be said to be a life sentence in the penitentiary, because a life sentence closes the door to all hope of liberty, except through executive clemency.

SMITH, C. J., delivered the opinion of the court.

In order that forgery may be committed, the writing alleged to have been forged must be one which, if genuine, might injure another. In the case at bar, if the report alleged to have been forged had in fact been made by Lula A. Moore and certified to by the trustees of the school, that is, if it had been in fact executed by the persons whose names are signed to it, and therefore a genuine writing, it would have conferred no power on the county officials to pay any one any money as compensation for having taught the school.

The only persons entitled to receive from the county superintendent of education a certificate for the payment of salary due for teaching a school, not in a separate school district, are such as have been elected teachers of the school by the trustees thereof, or appointed as such by the superintendent himself, and with whom he has contracted for the teaching of the school (sections 4497, 4522, 4556, 4557, and 4560 of the Code) and in the case at bar it is admitted that Lula A. Moore had not been elected by the trustees, or appointed or contracted with by the superintendent, as teacher of the school in question.

That a pay certificate was in fact issued by the superintendent when the report was presented to him is immaterial on this issue, for the reason that, had the report been

genuine, that is, in fact signed by the persons whose names are attached thereto, as hereinbefore pointed out, it would not have, even apparently, conferred upon the superintendent any authority to issue such a certificate.

Since no forgery was committed, appellant is not guilty of having uttered a forged instrument. The court should have granted the peremptory instruction requested by appellant, and there should have been a verdict and judgment accordingly. The judgment of the court below will be, therefore, reversed, and appellant discharged.

Reversed.

YAZOO & M. V. R. R. COMPANY v. MARY F. ROBINSON.

[65 South. 241.]

PHYSICAL EXAMINATION. *Power to require. Courts.*

The circuit court has no power either by statute or the common law, to require the plaintiff in an action for damages for personal injury, to submit to a physical examination by physicians appointed by the court.

APPEAL from the circuit court of Coahoma county.

HON. T. B. WATKINS, Judge.

Suit by Mary F. Robinson against the Yazoo & Mississippi Valley Railroad for damage for personal injury. From a judgment for plaintiff, defendant appeals.

Plaintiff alleged that by the violent jerking of the train she was thrown suddenly to the floor of the car and the lower joint of her spinal column injured. She asked for thirty thousand dollars damages and recovered ten thousand, five hundred dollars.

Mayes & Mayes, for appellants.

The first point we shall call to the attention of the court is this: That the court below erred in overruling the de-

fendant's motion to have the plaintiff submitted to a physical examination by two or more reputable and disinterested physicians, to be appointed by the court, such examination to be made at the expense of the defendant. *Western Glass Co.* v. *Schoeninger* (Colo.), 15 L. R. A. Ann. (N. S.) 663; *South Bend R. Co.* v. *Turner*, 156 Ind. 148; *Aspy* v. *Botkins*, 160 Ind. 160; *Schroeder* v. *Chicago, etc., R. Co.*, 47 Ia. 475; *Sibley* v. *Smith*, 46 Ark. 275; *Sidekum* v. *Wabash R. Co.*, 93 Mo. 400; *Shepard* v. *Missouri Pac. R. Co.*, 629; *Hill* v. *Sedalia, etc., R. Co.*, 64 Mo. App. 494; *Fullerton* v. *Fordyce*, 121 Mo. 1; *Alabama Gt. So. R. Co.* v. *Hill*, 90 Ala. 71; *St. Louis, etc., R. Co.* v. *Childress*, 82 Ga. 719; *Ottawa* v. *Gilliland*, 63 Kan. 165; *Dickinson* v. *Kansas City Co.*, 74 Kan. 863; *Belt Line Co.* v. *Allen*, 102 Ky. 551; *Belle of Nelson Co.* v. *Riggs*, 104 Ky. 1; *Miami Co.* v. *Baily*, 37 Ohio St. 104; *White* v. *Milwaukee R. Co.*, 61 Wis. 536; *Hess* v. *Lake Shore R. Co.*, 7 Pa. Co. Ct. 565; *Western Glass Co.* v. *Schoeninger*, 42 Colo. 357; *Denver City Co.* v. *Roberts*, 43 Colo. 522; *Wauch* v. *Winona*, 78 Minn. 98; *Harvey* v. *Philadelphia Co.*, 26 W. N. C. 231; *Dimenstein* v. *Richelson*, 2 Pa. Dist. 825; *Lane* v. *Spokane, etc., Co.*, 21 Wash. 119; *Brown v. Chicago, etc., Co.*, 12 N. D. 61; *United Co.* v. *Cloman*, 107 Md. 681; *Johnson* v. *Southern Pac. Co.*, 150 Cal. 535; *Logan* v. *Agriculture Society* (Mich.), 121 N. W. 485; *Murphy* v. *Southern Pac. Co.* (Nev.), 101 Pac. 322.

Cuttrer & Johnston, for appellee.

The circuit court in the state of Mississippi is without power to order a physical examination of a litigant in an action for damages resulting from personal injury. *Union Pac. R. Co.* v. *Bostford*, 141 U. S. 250, 35 L. Ed. 734 (Case Note), 15 L. R. A. (N. S.), 663; *Mills* v. *Wilmington City R. Co.*, (Del.) 40 Atl. 1114; *Pittsburg C. C. & St. L. R. Co.* v. *Story*, 104 Ill. App. 132; *Peoria D. & E. R. Co.* v. *Rice*, 144 Ill. 227, 33 N. E. 951; *Joliet St. R. Co.* v. *Call*, 153 Ill. 177, 32 N. E. 389; *Stack* v. *N. Y., N. H.*

& H. R. Co., 177 Mass. 155, 52 L. R. A. 328; *May* v. *Pac. R. Co.*, 32 Mont. 522, 70 L. R. A. 111; *McQuingan* v. *Del. & L. W. R. Co.*, 129 N. Y. 50, 14 L. R. A. 466; *Cole* v. *Fall. Brook Coal Co.*, 159 N. Y. 59, 53 N. E. 670; *Kingfisher* v. *Altizer*, 13 Okla. 121, 74 Pac. 107; *Austin & N. W. R. Co.* v. *Cluck*, 97 Tex. 172, 64 L. R. A. 494; *Parker* v. *Enslow*, 102 Ill. 272, 40 Am. Rep. 588; 9 Ency. of Evidence, page 796 and footnote. On this same point the case of *Schroeber* v. *Chicago, R. I. & P. R. Co.*, 47 Iowa, 375, is cited and explained, as is the case of *City of Chadron* v. *Glover*, 43 Neb. 732,——N. W. 62.

The application here made was not in proper form, nor properly supported, to enable the applicant to complain of the action of the court in overruling the motion. *Terre Haute & I. R. Co.* v. *Brunker*, 128 Ind. 542, 26 N. E. 178; *Richmond & D. R. Co.* v. *Childress*, 82 Ga. 719, 3 L. R. A. 808; *Joliet St. R. Co.* v. *Call*, 143 Ill. 177, 32 N. E. 389.

The allowance of an order for a physical examination where the court has the power so to do is a purely discretionary function, not to be disturbed except upon a clear showing of an abuse of the discretion. *Hill* v. *City of Sedalia*, 64 Mo. App. 494; *Shepard* v. *Mo. Pac. R. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Smith* v. *Spokane*, 16 Wash. 403, 47 Pac. 888; *Graves* v. *Battle Creek*, 95 Mich. 266, 19 L. R. A. 641; *Aspy* v. *Botkins*, 160 Ind. 170, 66 N. E. 462; *Sidekum* v. *Wabash, St. P. & L. R. Co.*, 93 Mo. 400, 3 Am. St. Rep. 549; *Norton* v. *St. L. & H. Co.*, 40 Mo. App. 642; *Louisville R. Co.* v. *Hortledge*, 25 Ky. L. Rep. 152, 74 S. W. 742; *Hatfield* v. *St. P. & D. R. Co.*, 33 Minn. 130, 53 Am. Rep. 14; Case Note, page 663, 15 L. R. A. (N. S.); *C. B. & Q. R. Co.* v. *Reith*, 65 Ill. App. 461. Upon the question of the amount of the judgment: *Railroad Company* v. *Grant*, 86 Miss. 565; *I. C. R. Co.* v. *Price*, 72 Miss. 862; *Yazoo, etc., R. Co.* v. *Scott*, 95 Miss. 43; *Railroad Co.* v. *Thompson*, 64 Miss. 584.

COOK, J., delivered the opinion of the court.

There is but one assignment of error in this appeal we deem it necessary to discuss. It is contended by appellant:

"That the court below erred in overruling the defendant's motion to have the plaintiff submitted to a physical examination by two or more reputable and disinterested physicians, to be appointed by the court, such examination to be made at the expense of defendant."

This question has not heretofore been considered by this court, and as it is an important question we will pretermit any examination of appellee's contention that the court below did not err in the instant case. We prefer to settle the question of the power of the circuit courts of this state to make the order appellant requested by its motion.

An examination of the decisions of the state courts upon this point discloses irreconcilable conflict. There is no statute of this state conferring the power upon the circuit court, and if the power exists it must be found in the common-law powers of the court. The supreme court of the United States in *Union Pacific Railway Co.* v. *Botsford,* 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, reviewing the precise question, said:

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Quoting further from the opinion of the court in the Botsford case, we find this:

"The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body or submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass."

Again, the supreme court in winding up its opinion said:

"The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States."

This expression applies with equal force to the practice, the common usage, and statutes of this state. The legislature has at various times given powers to the circuit courts of this state not possessed by such courts under their common-law jurisdiction. As pointed out in the briefs of counsel, the trial courts of this state are authorized by statute to send the jury to the *locus in quo,"* and power is also given the court to order parties to a suit to submit their books and papers to the inspection of the adversary. These statutes, and others of similar character, enlarge the common-law power of the courts.

Whatever may be the rules and practice of other states, the common law controls here until the legislature chooses to act upon the question.

Affirmed.

S. L. JOHNSON v. STATE.

[65 South. 218.]

1. CRIMINAL LAW. *Evidence. Confession. Voluntary. Admissibility. Preliminary evidence. Threats.*

A voluntary confession is one proceeding from the spontaneous operation of the party's own mind, free from the influence of any extraneous disturbing cause. A confession was not voluntary which was obtained from a defendant who was sick and in jail and in fear of lynching by a newspaper reporter who told the defendant he would have no peace or hope of salvation unless he confessed, that he, the reporter, was a "Spiritualist"

and could look into the defendant's heart, and see the crime which he had committed.

2. CONFESSIONS. *Admissibility. Sufficiency of preliminary evidence.* If on preliminary hearing by the court, there is a reasonable doubt as to whether a confession was freely and voluntarily made, it must be excluded from the jury, and after a confession has, on preliminary hearing by the court, been admitted to go to the jury, either party may introduce the same evidence as was submitted to the court, and any additional evidence relative to its weight or credibility, and if it then, or at any stage of the trial, appears that the confession was made under circumstances rendering it incompetent, it should be excluded. It is necessary to look to all the surroundings of the person making the confession in order to determine whether it is rendered inadmissible because it resulted from fear or threat or undue influence of a person, even though one not in authority, operating upon the mind of the person confessing. Even the act of third persons may amount to a threat excluding confession though no objectionable words are spoken.

APPEAL from the circuit court of Claiborne county.

HON. H. C. MOUNGER, Judge.

S. L. Johnson was convicted of murder and appeals. The facts are fully stated in the opinion of the court.

C. A. French, for appellant.

What purported to be a confession made by Johnson to Fitzgerald, should not have been admitted in evidence against the defendant, for two reasons, first, the confession was not shown to be absolutely free and voluntary, such as the law requires, and, second, for the reason that the *corpus delicti* was not clearly shown.

As to the first reason, I wish to say that there is no statute in this state regulating the admission of confessions, against one charged with crime, and therefore the admission of confessions depends entirely upon judicial annunciation of what the law is, as to what constitutes a confession, and when it is admissible.

A confession that may be used against a person who is charged with crime, and is on trial, as defined by Mc-

Kelvey on Evidence at page 111, sec. 75, is as follows, confessions are admissions of guilt made by persons accused of crime. Confessions to be admissible in evidence must be voluntary, if made as the result of threats or inducement they are inadmissible. McKelvey on Evidence, page 114, sec. 76. The important element in determining the admissibility of a confession, is that it should be voluntary. If it is voluntary within the definition of that term as laid down by the courts, it satisfies the only condition required.

The important quality of a confession is that it be spontaneous. The question then arises, did Johnson make a confession of guilt to Fitzgerald? If he did not, then the confession as detailed by the witnesses was clearly inadmissible. Fitzgerald told Johnson that he was a spiritualist, and that he could look down into his black heart and see the diabolic crime that he had committed, and that he, Johnson, was a liar. This was all done at the time when Johnson was sick, had fever, and was under the influence of medicines which had been administered by Dr. Hicks, and when Johnson was certainly in no fit condition to talk business of any kind, much less to make evidence that would be used against him, and might cost him his life, and as Fitzgerald said, that Johnson had spent a sleepless night, and was in a nervous condition, and was in jail and being hounded by all of the newspaper reporters in Vicksburg. Fitzgerald told Johnson, while in this condition, that he had better confess the crime and relieve his soul of the crime. Fitzgerald was then holding himself out as a spiritualist, and posing as Johnson's spiritual adviser. This was nothing less than a promise of reward that rendered the confession, if made, inadmissible.

This confession is testified to by Fitzgerald, was not that sort of a spontaneous, free and voluntary confession that the law recognizes as admissible in evidence against one charged with crime. This was not the sort

of a confession that comes from a clear and unclouded mind, that the law regards as sufficient to be used in evidence against the party making it. See note to sec. 80, page 118, McKelvey on Evidence.

The learned judge, who tried this case, should not have excluded the evidence of Dr. Acker, page 138-129, that evidence tended to show that a man sick with fever and taking quinine and other drugs usually administered by a doctor in malarial fevers, was not in a mental condition to make a clear statement of the fact that could be used in evidence against him as a confession. This evidence should have gone to the jury, or at least a part of it. This ruling of the court excluded from the consideration of the jury all evidence as to the mental condition of Johnson at the time he was supposed to have made the confession, and with the confession before the jury and no evidence whatever to rebut it, was very prejudicial to the defendant.

I respectfully submit that this was error in the learned trial judge. In McKelvey on Evidence, sec. 84, page 120, and in the note to that section it is held, that: "The question as to the mental condition of the accused at the time of making the confession is held to be for the jury to determine upon such evidence as both sides may submit."

The court in excluding the evidence of Dr. Acker from the consideration of the jury, left the jury nothing on which to base a finding against the condition of Johnson's mind that would render the confession either admissible or inadmissible.

I respectfully admit, that this was error in the trial court. The courts have shown the greatest liberality in the exclusion of declarations offered as confessions, particularly when made while in custody, or when under personal restraint, or where they have been obtained by questions assuming guilt, solicitations, promises or other inducements, threats or fraud; and the question of admis-

sibility of such declarations has, in many instances, turned upon the question whether they were made to one having official authority over the accused, or one sustaining toward him some confidential relation, such as his spiritual adviser, or one having control over or power to punish him. Encyclopedia of Evidence, Vol. 3, page 302, and authorities there cited.

The above authorities cover this case exactly, and show that the confession in this case was not such an one as should have been admitted. The confession, as detailed by Fitzgerald, that shows that it was not a free, voluntary and spontaneous confession of guilt, uninfluenced, by hope of reward, or fear of punishment as the law recognizes as admissible in evidence against the defendant, nor did it come from the defendant at a time when his mind was perfectly clear, and unclouded, but was made according to Fitzgerald's testimony, early in the morning while the defendant had fever, and had spent a sleepness night, and was in no condition to transact any sort of business, much less to make evidence against himself, which, if admitted by the court, might cost him his life. *State* v. *Smith,* 72 Miss. 42, 18 So. 482.

I respectfully call the court's attention to this case, for it strikes me that it is right in point, and especially so as the trial court excluded the confession, and the state appealed, and this court upheld the learned trial judge. The case of *United States* v. *Nutt,* 1 McLain, 499, 27 Fed. Case, No. 15900, and cited in note on page 303 Encyclopedia of Evidence, is also squarely in point, as are other material cases there cited.

The rule as laid down by the supreme court of this state seems to be the same as that stated in the text on page 303, Encyclopedia of Evidence, *supra,* and this court from the earliest decisions, seems to have required the strictest adherence to that rule, as is shown by the following cases: *William* v. *State,* 16 So. 296; *Harvey* v. *State,* 20 So. 837; *Ford* v. *State,* 21 So. 524; *Mitchell* v.

State, 24 So. 312; *Hamilton* v. *State,* 27 So. 606; *Blalock* v. *State,* 31 So. 105; *People* v. *Barrie,* 49 Cal. 324; *Spears* v. *State,* 2 Ohio St. 583.

From the rule as laid down in the foregoing cases which are respectfully cited, it appears that the confession as testified to by the state witnesses in this case against Johnson, was not that sort of a free, voluntary and spontaneous confession, uninfluenced by any outside influence as the law recognizes as a competent confession to be used against the party making it. I wish to call the court's attention to the following case, which, I think, is directly in point. *State* v. *Stallings,* 38 So. 261, 142 Ala. 112, I quote from the opinion of the court in that case, all confessions are *prima facie* not admissible as evidence, citing 1 Mayfield's Dig., page 206.

Again I desire to call the court's attention especially to the case of *Ammons* v. *State,* 32 So. 9, 80 Miss. 592, this case and the procedure of the Chief of Police Price, of Vicksburg, and his method of extorting a perfectly free and voluntary confession from the defendant, by the use of the sweat box, bears a very close affinity to the procedure of Mr. Fitzgerald, in his procedure in trying to extort the truth out of Johnson, by telling him, Johnson, that he, Fitzgerald, was a spiritualist, and that it would be better for him, Johnson, to tell the truth, and in Fitzgerald's opinion the truth meant that Johnson should confess the crime that Fitzgerald claimed had been committed, and which he, Fitzgerald, claimed to be able to look down into Johnson's black heart and see. Oh, man's inhumanity to man! *McAlister* v. *State,* 34 So. 156, 82 Miss. 459; *Peck* v. *State* (Ala.), 41 So. 759; *State* v. *Turner* (La.), 47 So. 680; *Banks* v. *State* (Miss.), 47 So. 437; *Dunham* v. *State,* 47 So. 545.

I respectfully submit that the confession as testified to by Fitzgerald was not so much a free, voluntary and spontaneous confession as the law requires, and was therefore not admissible, and the confession testified to

by the other witnesses, is controlled by the same law of evidence, for Johnson was prompted by whatever promise, or coercion as Fitzgerald had used to extort the confession, and therefore, no part of the confession should have been admitted.

Ross Collins, attorney-general, and *J. M. Vardaman,* associate counsel, for the state.

The error discussed by counsel in his brief is the admission, by the court, of the confession of appellant made to E. M. Fitzgerald and others the day after he was bound over to the grand jury by the justice of the peace. Counsel very earnestly contends that the confession of appellant was inadmissible, for the reason that appellant was unduly influenced by Fitzgerald and that his confession was induced by fear, improper influence, etc.

The record discloses that Fitzgerald went to see appellant twice on the day he was bound over to the grand jury and accused him of the crime, and told him that he, Fitzgerald, was a spiritualist and could look into his heart and tell that appellant had committed the crime with which he was charged. He appealed to him solely on religious grounds, urging that, if he was guilty of the crime as chagred, it would be better for his conscience for him to confess. At no place in the record is there even a suggestion that Fitzgerald offered appellant any promise of aid, assistance, immunity or anything of the kind, nor did he threaten him in any way whatsoever. The confession was made the morning after Fitzgerald had talked to him, and after appellant had had a night to think the matter over and decide, in a calm manner, what he wanted to do. Granting, for the sake of argument, that Fitzgerald did use undue influence, the day of the trial, that would not render incompetent a confession made at the later date after the influence was removed. The next morning when Fitzgerald and Fox walked into the jail all that was said was: Fitzgerald:

"Johnson, I see you had another restless night" and I said, "are you ready to confess this morning?" and he said: "Yes, boys, I am ready to tell you all about it." Does that sound like anything but a free and voluntary confession? I submit that it does not.

This court had passed on the question as to whether confessions are admissible where obtained by appeals to reputation, justice, religious grounds, etc., and has held that such confessions are admissible in evidence against accused. *Frank* v. *State,* 39 Miss. 705, 2 Mor. St. Cas. 1474; *Lee* v. *State,* —— Miss. 114. See, also, in relation to the admissibility of confessions, *Cady* v. *State,* 44 Miss. 332; *Jones* v. *State,* 58 Miss. 349; *Simmons* v. *State,* 61 Miss. 243.

The latest learning of the books on the admissibilty of confessions in general is found in the note to the Ammons case wherein every phase of cases, relative to the admissibility of confessions, is treated in a thorough and exhaustive manner. See, especially, page 785, *et seq.*; *Ammons* v. *State,* 80 Miss. 592, 18 L. R. A. (N. S.), 768. A confession, otherwise competent, is not rendered incompetent by the fact that it was elicited by questions assuming the guilt of the prisoner. 12 Cyc. 468 (ix); *Sam* v. *State,* 33 Miss. 347. See, also, in this connection: 12 Cyc., pp. 465 (iii), 469, (iii), 477 (m); Wigmore on Evidence, 840; Wharton, Cr. Ev., 674, *et seq.*

REED, J., delivered the opinion of the court.

Appellant was convicted of murder, and sentenced to suffer capital punishment. The admission of a confession in the trial of the case is assigned as error.

Appellant and deceased were occupying together two house-boats in the Mississippi river at Vicksburg. The body of the deceased was found floating in the river with weights fastened to it. Because of its having remained for a time in the water, it was nearly unrecognizable. Bruised places on the head indicated that the deceased

had met his death by violence. Immediately appellant was arrested for the crime.

Mr. E. A. Fitzgerald, a leading citizen and newspaper man in the city of Vicksburg, obtained a confession from appellant. Mr. Fitzgerald's testimony shows that he was present at the coroner's inquest held that morning after the body was found. He took part in the examination before the coroner to the extent of indicating questions to be asked. After the inquest, he visited appellant in the jail. Late, in the evening, about seven p. m. of the same day, he went again to see appellant. The next morning he visited appellant the third time, and then secured the confession.

The purposes which Mr. Fitzgerald had in mind when he sought to obtain a confession from appellant will be shown by the following extracts from his testimony:

"Several murders had been committed around there on the canal, and I thought it was my duty as a citizen we ought to try to ferret it out. . . . I wanted to get his confession for the newspaper enterprise, and every now and then we fish somebody out of the canal that had been killed, and we never could convict anybody or get any trace of it, and I felt I owed it, as my duty, as a citizen of Mississippi and Warren county; I had nothing against Johnson. . . . I went there because I know when a man is sleepless he is at his worst point, and you can control him, and he is more ready to tell the truth and unburden himself and tell the truth; if you can get a criminal for a few nights, and you know they are restless and sleepless, you can go there and get the confession; otherwise, if I had wanted it as a newspaper article, I would have gone that afternoon, and it took me off my pins when he confessed so quick. . . . I thought he was guilty, and I think the hope of salvation is held out to the worst of sinners, and if he would confess, there was hope of saving his immortal soul; and I had a little newspaper enterprise in it I will admit; I have nothing

to conceal about it at all. I felt like he was guilty, and I have had some training in that line and was post-office inspector, and I have gotten confessions out of people before I met Johnson; he is not the only man I have gotten a confession out of."

Appellant was sick with fever during the time he was visited, and Mr. Fitzgerald knew that he had medicine to take, and was told by appellant that he could not eat anything and was suffering from malaria.

Appellant was, at the time, under fear of being lynched. He told Mr. Fitzgerald that he was afraid, and "wanted to die a decent death." He was told by Mr. Fitzgerald that the people believed that he was guilty, and that the body found was that of the deceased. Mr. Fitzgerald testified that, at the time of the conversation with appellant he did not know whether the body found was that of Elston Brewer, the deceased, and that he had no definite knowledge relative thereto until appellant's confession. We quote from the testimony of Mr. Fitzgerald to show what statements were made by him to induce appellant to confess:

"Q. How many trips did you make to see him? A. Three. Q. What happened between you and Mr. Johnson at the jail on your first visit there? A. Well, I tried to get him to confess. Q. What did you say to him to induce him to confess? A. Nothing specially; I told him I thought he was guilty. I heard the testimony at the coroner's jury; and he looked listless and nervous, and I didn't think he would have any peace until he unburdened himself of this awful crime I thought he had committed. Q. You told him also you were a Spiritualist, and could look down in his soul and see the black crime he had committed? A. I didn't tell him that way. I went up there that evening and said, 'You better confess; that boy we dug up there, these printers say, to the best of their knowledge, it is Elston Brewer, and there is no doubt about your guilt, and you have not slept a wink.

since you killed that boy, and you won't have any peace until you confess;' and I asked him what church he belonged to and he had better look beyond the grave for comfort; that his only hope was salvation, and asked him what church he belonged to; and he said he didn't have much training at all, and went to the Baptist and Methodist Church; and I told him we had some mighty good ministers in town, and if he wanted one I would get one; and he said, 'No,' he didn't want one then, but he would see about it later; and he said, 'What are you, anyhow?' and I said, 'I am a Spiritualist, and I can look down in your black heart and see this diabolical crime you committed at midnight the other night.' I was hitting in high places when I said that, of course."

Thus far the facts and circumstances connected with the making of the confession by appellant have been stated by us from the testimony of Mr. Fitzgerald. Upon one of his visits to the jail to see appellant, Mr. Fitzerald was attended by another prominent newspaper man of the city of Vicksburg, Mr. F. P. Cashman, city editor of the Evening Post. Mr. Cashman testified that appellant was very sick when he visited him with Mr. Fitzgerald. Continuing his testimony, Mr. Cashman said that appellant was lying on his cot, and great beads of perspiration breaking out on his forehead and his hands and all portions of his cheek, and he was tossing from one side of the cot to the other, and turning over, and sat up awhile and laid down awhile, and his sentences were disconnected, and looked like he was mentally deranged." He further stated that Mr. Ftzgerald talked to appellant for a length of time which appeared to witness to be about an hour, and was telling appellant that "he was a liar and a murderer, and he better confess and ease his conscience.' Mr. Cashman visited appellant next morning about 11 o'clock, shortly after the confession had been given Mr. Fitzgerald, and he testifies that he found appellant still sick, suffering with fever and in an abnormal condition.

Viewing all the facts and circumstances surrounding the securing of the confession, we do not believe that it was of such free and voluntary character as to render it admissible in this case. It is well-nigh impossible to have a fixed rule by which may be determined the amount or degree of improper influence necessary to make a confession involuntary. It was said by Judge HANDY, in the opinion of *Simon* v. *State,* 37 Miss. 288, that:

"It is a very familiar and well-established rule that a confession is not admissible in evidence, unless it is made freely and voluntarily, without restraint, and without hope of reward or fear of punishment."

A confession cannot be said to be in every respect freely and voluntarily made if it has been obtained by any sort of threat or violence, or any promise, direct or implied, or by the exertion of any influence. Underhill on Criminal evidence (2d Ed.), sec. 126. Mr. Underhill, citing the case of *People* v. *McMahon,* 15 N. Y. 384, makes the following quotation in his note on this subject:

" 'Voluntary' is not always used in contradistinction to 'compulsory.' In many cases 'voluntary' means proceeding from the spontaneous operation of the party's own mind, free from the influence of any extraneous disturbing cause."

It has been held by this court that a confession should not be admitted if there is a reasonable doubt as to whether it was freely and voluntarily made. Concerning this, we quote from Brame & Alexander's Mississippi Digest, p. 318:

"If, on preliminary hearing by the court, there is a reasonable doubt as to whether a confession was freely and voluntarily made, it must be excluded from the jury —citing *Ellis* v. *State,* 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; *Williams* v. *State,* 72 Miss. 117, 16 So. 296; *State* v. *Smith,* 72 Miss. 420, 18 So. 482. And, after a confession has, on preliminary hearing by the court, been admitted to go to the jury, either party may introduce

the same evidence as was submitted to the court, and any additional evidence relative to its weight or credibility, and, if it then, or at any stage of the trial, appears that the confession was made under circumstances rendering it incompetent, it should be excluded—citing *Ellis* v. *State,* 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; *Williams* v. *State,* 72 Miss. 117, 16 So. 296; *Simmons* v. *State,* 61 Miss. 243."

It is necessary to look to all the surroundings of the person making the confession in order to determine whether it is rendered inadmissible because it resulted from fear or threat or the undue influence of a person, even though one not in authority, operating upon the mind of the person confessing. Even the acts of third persons may amount to a threat excluding confession, though no objectionable words are spoken. Bishop's New Criminal Procedure, secs. 1237, 1238. *Ammons* v. *State* (sweat box case), 80 Miss. 592, 32 So. 9, 18, L. R. A. (N. S.) 768, 92 Am. St. Rep. 607.

In the case at bar, to the surrounding circumstances must be added the vivid expressions and denunciations made by the person to whom the confession was given. Appellant was friendless and a stranger in the city. He was charged with the gravest offense known to the law and imprisoned therefor. He was ill and in a nervous and weak physical condition. He was under fear of mob violence. In this condition he was visited three times within twenty-four hours by a strong man, one who was experienced in obtaining confessions, and who visited him only to secure his confession. The very words used in the effort to obtain the confession was enough, under the circumstances, to put appellant, already sick and excited, in nervous dread. We cannot see that appellant was unaffected by all these things. It does not appear that the confession was from the "spontaneous operation" of appellant's own mind. It was not free from extraneous causes and influences. It was not free of constraint.

We do not impugn the motives of Mr. Fitzgerald in the matter. He is shown to be a zealous citizen. His very zealousness, however led to a course of conduct resulting in an influence, the exertion of which on the mind of appellant was sufficient to render his confession not free, and not voluntary.

The influence flowing from Mr. Fitzgerald's words cannot be relieved of objection by the claim that they only appealed to the spiritual hopes or fears of appellant; for a consideration of all he said to appellant, in connection with surrounding circumstances, will show that there was more than spiritual influence in this case. By "spiritual," as used to define hopes and fears which may be held out to one charged with a crime when a confession is sought, we understand to mean that which pertains to the soul or higher endowments of the mind in its relation to the Spirit of God—the Holy Spirit—and that which pertains to our holy religion. The spiritual nature of a man would be his higher self, not the carnal. We understand from the facts in this case that, when Mr. Fitzgerald claimed he was a Spiritualist, he was not meaning that he was one who was spiritual or spiritually minded in the sense we have just given; but on the other hand, he was claiming to have some power through intercourse with the spirit world—the realm of the supernatural—to have the hidden power of occultism, or, as a spiritual medium, to divine the very thoughts of the accused. A man ill and nervous could be thrown into a serious physical fear and constraint, even though from superstition, which is a fear of that which is unknown or mysterious, by the intense statement of one who claimed he was a spiritualist—that is, one who holds communications with departed and disembodied spirits—and said that he could see into his black heart and detect guilt.

We do not believe that appellant has been given the fair trial guaranteed to him by our fundamental laws, free from the admission and influence of incompetent tes-

timony. In this consideration, we are dealing only with the action of the trial court in refusing and failing to exclude the confession made by appellant to Mr. Fitzgerald. We conclude that it was shown during the trial of this case that the confession was made under such circumstances as to render it incompetent as evidence, and that it therefore should have been excluded by the court.

For the error of the court in not doing so, this case is reversed and remanded.

Reversed and remanded.

SMITH, C. J., delivered a dissenting opinion.

Some time in July, 1913, Mr. George Dillon discovered the body of a dead man floating in the canal at Vicksburg. When drawn to the shore it was found that the skull of the dead man had been crushed, and that the body had then been incased in a sack and wrapped in a quilt, to which rocks and stones had been attached with sash or tiller cord. This body was afterwards identified as that of Elston Brewer, a young man twenty-six years of age, who, together with appellant, had gone to Vicksburg from some point in Arkansas, probably Cave City.

Brewer was the owner of two small boats, one of them being a house-boat in which he and appellant lived. He was a printer by trade, and, according to the testimony of his father, was at the time going down the river on a pleasure trip. According to the confession of appellant, he and Brewer had started for New Orleans, Brewer promising to give appellant a job, the nature of which does not appear. Before the finding of this body, appellant had mentioned the disappearance of his partner, Brewer, and when he saw the body, which seems to have been drawn ashore near the boats in which he and Brewer lived his actions were such as to arouse the suspicions of those who saw him.

A day or two before the finding of this body, appellant went to the Merchants' National Bank of Vicksburg,

told one of the officers thereof that his name was Brewer, and asked him how he could obtain some money, and was told "to have some bank to wire us to pay him the money and waive identification." This bank afterwards, on July 16th, received a telegram from a bank at Batesville, Arkansas, directing it to pay Brewer the sum of fifty dollars, and to waive his identification.

On the day before the receipt by the bank of this telegram—that is, on the 15th of July—appellant went to the office of the Western Union Telegraph Company and delivered to the operator in charge the following telegram, which was accepted and sent by the company:

"To G. W. Brewer, Phone Cave City, Ark., Batesville, Ark. Want larger boat. Coming back. Wire fifty dollars at once to Merchants' National Bank without identification. Letter follows. Elston. (Subject to delay.)"

G. W. Brewer was the father of Elston Brewer, and when the telegram was delivered to the operator by appellant he told her that G. W. Brewer was his father. Appellant was identified by the officer of the bank with whom he dealt, and by the telegraph operator, as being the man who made the inquiry at the bank, and as the man who sent the telegram above referred to. This telegram addressed to Mr. G. W. Brewer was received by him, and the telegram from the bank at Batesville to the bank at Vicksburg was sent at his request.

After being arrested and placed in jail, appellant confessed to several parties on different occasions that he had killed Brewer, his confession being, in the language of the witness Fitzgerald, as follows:

" 'The boy promised me when we left Arkansas that he would go to New Orleans, and after he got here he made up his mind to make his way back home.' And I think he said he was going to sell the boats and go back and send him adrift, or make his way back to Memphis and go home, and said: 'We quarreled a good deal about it Sunday and Sunday evening; we read a while, and I

cooked supper, and we played cards again, and we quarreled again, and we used the quarrel; I knew Elston pretty well, and I didn't think he was treating me right, and the boy went to bed about ten o'clock, and about one or two o'clock—some time after twelve, I don't remember the exact time—I got up and he was asleep, and I went and got the ax and hit him one lick in the head, and he groaned and made a loud noise, and I was afraid the passersby would hear him, and I went back and hit him until he was perfectly still.' And then he said: 'I got out; the boat was by the Y. & M. V. depot, and I came up and sat on the curb for a while, and went up on Washington street, and first thought I would give myself up, and studied about that for a while, and went back on the boat and got a sack and put some stones in it, and tied the sack around Elston's body and turned the boat around and shoved him overboard, and he sank.' "

A few days before he was killed, Brewer had attempted to sell his boats; one of the parties to whom he attempted to sell being Mr. Dillon, the gentleman who afterwards discovered his body floating in the canal. That Brewer was murdered seems not to be open even to the suggestion of a doubt, the only fact to be determined being the identity of the murderer.

The only ground upon which a reversal of the judgment of the court below is asked in which there can be any sort of merit is the one upon which my Brethren think the judgment should be reversed, and that is that the court erred in admitting the testimony of Mr. E. A. Fitzgerald, to whom one of the confessions introduced in testimony was made. The ground upon which the reversal is placed is that this confession was not "in every respect freely and voluntarily made," and because "it does not appear that the confession was from the 'spontaneous operation' of appellant's own mind."

Confessions are nothing more than a particular class of admissions against interest, are always competent

when it appears that they were not obtained under such circumstances as destroy their trustworthiness, and the rule is, stated negatively, that a confession is not admissible in evidence when it appears that the defendant was coerced into making it by violence or threats of temporal injury, or was induced to make it by a promise of some material temporal benefit; the theory upon which a confession so obtained is excluded being that it is untrustworthy, for the reason that it may have been made without regard to its truthfulness, in order that the person making it might be relieved of pain or threatened injury, or in order that he may obtain the benefit of the promise made. If the alleged coercion or promise is not of such character as will probably bring about this result, the confession is admissible; all doubts as to its admissibility, when such arise, being resolved against it. This is all that is meant by the rule that confessions must be free and voluntary, as will be readily seen by an examination of the facts in the cases in which the rule has been so announced. 1 Wigmore on Evidence, sec. 821, *et seq.*

As stated by this author in section 822:

"The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported; but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence. What are the circumstances which may make such an acknowledgment preferable? They are usually described

as involving either a promise or a threat. Thus a promise of certain pardon, when attached to a confession, may conceivably make a confession, irrespective of its truth, seem more desirable than silence with its contingencies; or a threat of instant hanging by a mob, unless a confession is forthcoming, may conceivably make the contingencies of a confession more desirable than the certain consequences of silence. It is this way that a confession of guilt may become untrustworthy as testimony."

Bearing in mind this rule, let us now examine the evidence relative to the making of this confession. When Mr. Fitzgerald was introduced as a witness, "at the request of counsel for defendant, the jury was ordered to retire from the courtroom," and he was then examined with reference to the circumstances surrounding the making of the confession. From this examination it appeared that he had three separate and distinct conversations with appellant: First, "about twelve or one o'clock, after the coroner's verdict was rendered;" second, "that evening about seven o'clock;" and, third, the next morning at ten o'clock, the confession being made at the last interview. Fitzgerald admitted that he was trying to find out who had killed deceased, both for the reason that he thought it his duty as a citizen to do so, and for the further reason that he wanted the information for the newspaper with which he was connected. He was asked if during either interview he held "out any hope of reward or offer of help or aid of any kind or character at any time . . . or any threat or fear of punishment to him if he did not make a statement," and he stated that he did not. On the first visit he only talked with appellant about fifteen minutes, and what he said to him can be best stated in his own language:

"I told him I thought he was guilty and there would be no peace on earth for him this side of the grave, and the best thing he could do was to confess and try to save his soul; salvation was what I talked to him about more than anything else." (Record, p. 71.)

At his next interview with appellant, which occurred at seven o'clock in the evening, and which lasted about five or ten minutes (Record, p. 71) he said to appellant:

"'You better confess; that boy we dug up there, these printers say, to the best of their knowledge, it is Elston Brewer, and there is no doubt about your guilt, and you have not slept a wink since you killed that boy, and you won't have any peace until you confess.' And I asked him what church he belonged to, and he had better look beyond the grave for comfort, that his only hope was salvation, and asked him what church he belonged to; and he said he didn't have much training at all, and went to the Baptist and Methodist Church; and I told him we had some mighty good ministers in town, and if he wanted one I would get one; and he said, 'No,' he didn't want one then, but he would see about it later; and he said, 'What are you, anyhow?' and I said, 'I am a Spiritualist, and I can look down in your black heart and see this diabolical crime you committed at midnight the other night.' I was hitting in high places when I said that, of course." (Record, p. 75.)

At the third interview, which occurred at about ten o'clock the next morning, all that Fitzgerald said to appellant in this connection was:

"'Well, you had another restless night; I see you never slept a wink last night. Are you ready to confess this morning?" And he said: 'Yes, boys; I am ready to tell you all about it.'" (Record, p. 76.)

Appellant then proceeded to make confession.

On this visit Fitzgerald was accompanied by Mr. Fox, manager of the Western Union Telegraph Company, who was also introduced as a witness to the confession. He was asked the following question:

"Tell the jury whether or not you or Mr. Fitzgerald, either one, at that time held out any hope of reward or aid, or threatened him, to make any statement or confession to you or Mr. Fitzgerald." (Record, p. 94.)

To which he replied:

"None whatever; I don't think there were two words before he made the remark and said: 'Well, boys, I am ready to confess this morning.' " (Record, p. 94.)

The statement made by appellant to Fitzgerald as to his fear of being lynched was made at the second interview, was not caused by anything said to him by Fitzgerald, and there is nothing in the evidence to indicate that the confession was made on account of any fear of being lynched. (Record, pp. 71 to 77.) All that appellant said with reference to any fear of being lynched was that he didn't want to attend a preliminary hearing, for the reason that he was afraid he would be lynched, and Fitzgerald told him he could waive examination, and would not be out of jail more than twenty minutes.

When the court was called upon to rule on the competency of Fitzgerald's testimony, no testimony except that of his own had been introduced, or sought to be introduced, with reference to the circumstances surrounding the making of this confession. From that it did not appear whether, at the time of making the confession, appellant was sick or well. After the confession had been admitted, and on cross-examination by counsel for appellant, Fitzgerald stated that, while he did not know it of his own knowledge, he thought appellant was under treatment of a physician and was taking medicine at the time; that appellant spoke of having contracted malaria on the river; but that his condition appeared to him (Fitzgerald) to be normal.

It will be observed from this statement that appellant was not threatened with any temporal harm in event he declined to confess, or promised any temporal benefit in event he should do so. What was said to him, in effect, was simply this: That Fitzgerald, by reason of being a Spiritualist, knew that he had committed the crime, and that, by reason of his having committed it, he would have neither peace here nor salvation hereafter, unless he con-

fessed it; that "the best thing he could do was to confess and try to save his soul."

From this it will be seen that the punishment with which appellant was threatened if he did not confess and the benefit which he was told he would obtain by confessing were both predicated upon a belief in a life beyond the grave and upon a future state of punishments and rewards. In numerous decisions it has been held that exhortations invoking the terrors of punishment predicated upon theological beliefs, and the holding out of hopes of a spiritual nature do not make the confession thereby obtained incompetent, as will appear from an examination of the authorities cited by Wigmore to section 840 of volume 1 of his Treatise on Evidence, and collated in a note to *State* v. *Williams,* Ann. Cas. 1913B, 310.

No case holding the contrary has come under my observation, and, according to Mr. Wigmore, no such case can be found. "It is obvious that, in their ordinary aspect, the influence of religious considerations makes entirely for truth in a confession, and not against it. Mr. Joy's exposition of this point can never be improved upon:

"1842, Mr. Joy, Confessions, 51: 'It seems difficult to imagine that a man under spiritual convictions and the influence of religious impression would therefore confess himself guilty of a crime of which he was *not* guilty; or that a man under a strong sense of his spiritual relations with God could hope to please God by a falsehood; that a "confidence created" between him and his pastor, or the "being thrown off his guard" by this confidence, should induce him not to confess (*that* it might naturally do if he were guilty), but induce him to confess *falsely.* Such spiritual convictions, or spiritual exhortations, seem, from the nature of religion, the most likely of all motives to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the motive which in-

duces it is calculated to produce untruth, because it is likely to lead to falsehood. If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead to nothing but truth.' " 1 Wigmore on Evidence, sec. 840.

This point was expressly decided by our old high court of errors and appeals in *Frank* v. *State,* 39 Miss. 711, wherein the court said:

"Anything reasonably tending to hold out the hope or promise of reward or benefit for confession, or of punishment or injury for the failure to confess, is in law an unwarrantable inducement to confess, which renders the confession so obtained incompetent evidence. But there may be other 'inducements' held out to a party which are not within this rule. An appeal to the character or circumstances of a party, to his family connection and situation in life, to the claims of justice of others whose rights or safety were involved in his declaring the truth, *to his responsibility to a tribunal above all earthly courts for his falsification or suppression of the truth*—these and others might very naturally be an 'inducement' to a party to make a confession. Yet a confession so induced would not necessarily be incompetent; for the inducement would not be illegal."

If the testimony of Mr. Cashman referred to in the opinion in chief is material, it can be only on the theory that at the time appellant made this confession his mind was in such condition because of his illness that he was incapable of knowing and appreciating what he was doing, and I do not understand my Brethren to predicate the reversal on any such ground. Moreover, this testimony was not before the court when the confession was admitted, and after the introduction of Cashman's testimony the court was not requested to exclude the confession, and, in the absence of such a request, was not called upon to do so. The testimony is of no material value, however, because Cashman was not with Fitzgerald when the confession was made. The interview about which he

testified was the second one which took place on the evening before the making of the confession.

But, even if it should be conceded that this confession was obtained by Fitzgerald under circumstances which render it ordinarily incompetent, the judgment of the court below should not be reversed, for the reason that at least two other confessions were made by appellant and introduced in testimony, one to Dr. Hicks at a time when it is manifest from the evidence that whatever fear or hope may have induced the confession to Fitzgerald had passed out of his mind, or, rather, was not then influencing him in what he said, and another to Mr. Cashman, who was introduced and testified, not in behalf of the state, but in behalf of appellant himself. Any ground for reversing the judgment of the court below because the admission of the confession to Fitzgerald therefore disappears, for the reason that all doubt of the trustworthiness of the confession has been removed, because of its confirmation by appellant on two separate occasions.

And, moreover, since the facts contained in his confession to Fitzgerald were fully proven by these two other confessions, and the verdict was fully supported thereby, no harm was done appellant by the admission of Fitzgerald's testimony, even though it be conceded to be incompetent, for this court has decided "many a time and oft" that it will not reverse the judgment of a court below because of the admission of incompetent evidence to establish a fact otherwise sufficiently proven, and that "a judgment which is fully supported by competent evidence will not be disturbed because of the admission of improper testimony." See the legion of Mississippi cases in support of these two propositions cited in 1 Miss. Dig., p. 157, sec. 1051.

Had the confession made to Fitzgerald been excluded and the ones made to Dr. Hicks and Mr. Cashman been admitted, and the one testified to by Dr. Hicks was ad-

mitted without objection, there can hardly be a doubt but that the verdict rendered would have been the same as it now is. When Dr. Hicks asked appellant if he had made a confession, he replied, "Yes; I have made a clean breast of it." Then, in the language of the witness:

"I asked him why he made the confession, and he said 'Because I am tired of it; all life has been nothing but days of darkness to one of sunshine to me for the last ten years, and life holds no pleasure to me, and I had as soon die as live, and I had rather they hang me than stay one year in the penitentiary, and the quicker the better; I wish they would do it tomorrow.' And I asked him what end of the ax he hit him with, and he said: 'I hit him first with the blunt end, and then he groaned and groaned, and made a noise I thought would attract attention, and I went back and struck him two or three more licks until he ceased all groaning or noise.' And I asked him why he did that. He said: 'Well, I don't know, except I didn't think I had been treated right or fairly.' And I said: 'In what way?' I said: 'In what way have you been treated unfairly?' And he said: 'Well, Mr. Brewer brought me down here under the promise he would look after me and give me a job;' and said, 'I got here, and the financial outlook was not as bright as Mr. Brewer hoped for, and he abruptly told me he was going to sell his boats and disband and go back, and I would have to shuffle for myself, and I got mad about it, and thinking over the matter, and the more I thought of it the madder I got, and I went out on the front part of the boat, and sat out there and meditated over it for an hour or more, and determined to kill him, and went back and struck him with the ax." (Record, p. 85.)

For these reasons, I think the judgment of the court below should be affirmed.

LAFAYETTE MITCHELL *v.* B. M. TUBB.

[65 South. 216.]

1. CODE 1906, SECTION 1983. *Taxation. Sale of land. Presumptions. Prima facie evidence. Pleading. Bill of particulars.*

Under Code 1906, section 1983, so providing a conveyance made by tax collectors to an individual purchaser of land at a sale for taxes, and the list of lands sold to the state at such sale, are *prima facie* evience that the assessment and sale of the land was legal and valid, and where there is a valid existing law providing for the taxation and sale for delinquent taxes where the land in question is sold to the state, the list of lands sold to the state and introduced to support plaintiff's title was *prima facie* evidence that the land was assessed and sold under such valid existing law, notwithstanding the existence of another act providing for the assessment and sale of land for taxes, which was thereafter repealed and declared unconstitutional.

2. PLEADING. *Bill of particulars. Evidence.*

Where plaintiff, in ejectment, claimed through a tax deed, defendant was not required to amend his bill of particulars showing his chain of title, in order to prove that the taxes for the nonpayment of which the sale in question was made, had been levied under an unconstitutional act, to show the invalidity of plaintiff's claim.

3. PLEADING. *Bill of particulars. Code* 1906, *Section* 1827.

Section 1827, Code 1906, providing for a bill of particulars in an action of ejectment, contemplates only that either party shall inform the other, when requested so to do, of the evidence documentary or verbal, by which he expects to establish his own title or rather, of the deed or other sources of title through which he claims and not that he shall inform the other party of evidence which he will introduce in order to show the invalidity of one deed or the source of title through which such other party claims.

APPEAL from the circuit court of Monroe county.

HON. J. H. MITCHELL, Judge.

Suit by B. M. Tubb against Lafayette Mitchell. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Pain & Pain, for appellant.

We submit first that the general laws for assessment and collection of taxes and sale under said assessments during the years 1889, 1890, 1891 and part of 1892 was the so-called Madison Act as passed by the legislature of 1888 and found in the Laws of 1888, on page 24. That said act repealed all former assessment laws and that this general assessment law was not repealed or changed by the legislature in 1890 and was not in fact repealed until 1892. That this Madison Act of 1888 is unconstitutional and void and any assessment made under it, and any sale under it, for taxes is void and invalid and passes no title. That this act was not declared unconstitutional by the supreme court until in 1900. That this court will take judicial knowledge of these acts and laws without the same being plead by the defendant. That the assessor of taxes and the board of supervisors are presumed to make all assessments and levy all assessments under the then existing general law of assessments. That the assessor of taxes and the board of supervisors are mere executive officials in this respect and are not judicial officers. That the court in this case will presume that the assessor and the board of supervisors assessed the taxes in this case under the Madison Act, the then existing general assessment law in the absence of any proof to the contrary.

The plaintiff showed in his evidence that this land was sold in the year 1892 for the taxes of 1891 and introduced no proof that the sale was made under any special or local act of the legislature. Therefore the court will presume that this sale of the land was made under the Madison Act and sale is therefore void and invalid and, of course, therefore gives no title, hence, whatever *prima facie* case plaintiff made out, by the introduction of his tax deed and list of lands sold to the state, was rebutted by the fact that he showed, in addition, that this sale was made under the unconstitutional Madison Act and that his tax deed was worthless and void.

The cases of *Coffee* v. *Coleman,* 85 Miss. 14 and *Butts* v. *Ricks,* 28 Miss. 533, have no bearing or throw no light upon the question at bar and are not decisions in support of the appellee.

Plaintiff, in his suit of ejectment, must recover, if at all, upon the validity of his own title and not on the weakness of defendant, who is shown to be in possession of the land. *Hawkins* v. *Mangum,* 78 Miss. 97; *Scarborough* v. *Elmer,* 87 Miss. 508; *Eastland* v. *Lumber Company,* 90 Miss. 334; *Hammer* v. *Yazoo, etc. R. R. Co.,* 56 So. 466; *Duke et al.* v. *Clark et al.,* 58 Miss. 465; *J. Davaney* v. *Koon,* 45 Miss. 71; *Revenue Agt.* v. *Tonella,* 70 Miss. 701; *Ray, Executor* v. *Doe,* 10 S. & M. 461; 16 Cyc., letter "C" and authorities, 1076; 10 L. R. A. (N. S.); *Railroad* v. *Shannon,* U. S. S. C. Digest 689, sec. 47, page 4196; *Day* v. *Smith,* 87 Miss. 406-409; *Coffee* v. *Coleman,* 85 Miss. 145; Laws of 1888, page 183; *Scharborough* v. *Elmer,* 87 Miss. 508; *Butts* v. *Ricks,* 82 Miss. 533; *Gregory* v. *Brogan,* 74 Miss. 649.

We respectfully submit that the general law for assessing property, which was in force during the time that lands in controversy were assessed and sold, was the Madison Act of 1888; that this act is void and unconstitutional and a sale under it passes no title; that the court must presume that the assessor and the board of supervisors acted under said general assessment law, the Madison Act, in making the assessments; that, therefore, appellee, by showing that the land was sold in 1892 for taxes of 1891, by the introduction of the record from the chancery clerk's office of Monroe county, Mississippi, did rebut and destroy whatever *prima facie* case he made out by the introduction of the tax deed from the state; that, therefore, appellee failed to make out his case sufficient to require the appellant to make any proof. The burden of proof was then on appellee to show that this sale did not occur under this invalid and void general assessment law but occurred under some other and

different special or general law which appellee did not do.

Even though we may be mistaken in our position as above outlined, yet the court erred in not allowing appellant to reopen his case to show that the sale occurred under the Madison Act and erred in not allowing appellant to amend his bill of particulars so as to show that the sale of the lands took place under assessments made under the Madison Act.

We therefore submit that the case should be reversed and a judgment entered here for appellant.

Leftwich & Tubb, for appellee.

It will be observed that this action proceeded regularly under chapter 42 of the Code on ejectment, all in statutory form. Bills of particulars and abstracts of title were demanded by both parties and the demands responded to, and of course, the evidence of title was necessarily confined to the matters contained in the bills of particulars. Code of 1906, section 1827. The bill of particulars is an admission of record that the respective parties claim under the respective chains of title set out therein. *Gilliam* v. *Case,* 67 Miss. 588.

There is no suggestion anywhere in the bill of particulars that defendant below, represented as he was by astute and experienced lawyers, would contend or claim that the assessment was made under the alleged Madison Act of 1888. The cause went to trial on that state of the record, the jury was empanelled and sworn, the evidence *pro* and *con* was admitted and read to the jury and both parties closed the case. The court then granted a peremptory charge to the plaintiff, as he was bound to do, and at that late day, the defendant undertook to reopen the case, to set up that the assessment was made under the alleged Madison Act, unconstitutional, and therefore, the sale for taxes was void. This was an attempt palpably to go outside of the bill of particulars

and import into the record, facts which would destroy the plaintiffs case without giving plaintiff any notice whatever that such an attempt would be made. In his evidence defendant showed that he and those under whom he claimed had been in possession of the land in question for many years, but of course the state bought the land in 1892 and no statute of limitations could run against it, and Tubb himself did not buy from the state until the 27th day of March, 1912. The proof showed that Tubb had never been in possession of the land, but possession or occupancy is not necessary to effectuate a valid tax deed. *Lewis* v. *Griffin,* 60 So. 651, 103 Miss. 578.

But after the plaintiff had tried his case, after the case had been tried and closed, and judgment rendered by the court, without excuse or sxplanation of any sort and without extenuation for not doing so before, defendant attempted to amend his bill of particulars by pleading that the assessment was made under the alleged unconstitutional Madison Act, and therefore void. The court overruled the attempt to thus re-open the case, and we submit that the court could not, in justice, have done otherwise, for the plaintiff had no notice whatever that his title would be assailed at such a point, and no opportunity to adduce countervailing testimony, and his unpreparedness would have to at once overwhelmed him without any fault or any lack of oversight of his own. This attempt came too late, as the court has, time and time again, heretofore decided. *Leach* v. *Flynt,* 33 So. 496; *Richards* v. *Lee,* 45 So. 570, 91 Miss. 657; *Geoforth* v. *Stingley,* 79 Miss. 398; *Early* v. *Long,* 89 Miss. 285; 15 Cyc. 108.

As these authorities well establish, not only was the court eminently correct in disallowing the attempt to amend and the course taken has been approved time and time again, but as many times decided in declining to reopen the case, the court was acting strictly within the

bounds of discretion, and there is certainly no evidence here that he has abused his discretion. 15 Cyc. 108, and cases cited; *Dugan* v. *Chaplin,* 75 Miss. 441.

Plaintiff planted himself on his tax deed and the list of lands sold to the state with all the presumptions thereunder by section 1982 of Code of 1880, and of course, if defendant were going to assail the validity of the assessment as void, he should certainly have so stated in his bill of particulars, not only in fairness, but by the very terms of the statute, so that the plaintiff might have shown that the assessment was made under the valid statute of the Code of 1880. We hardly think anything could be more plain than that. So much for the necessity, on the part of the defendant, of keeping within the terms and conditions of his own bill of particulars.

But counsel in their brief invoke the presumption that the assessment of this land was under the void Madison Act, and, therefore, was illegally made. This is the fundamental voice of the argument of defendant's counsel in support of the motion. Counsel wholly ignore the force and effect of a presumption. Presumptions do not supply facts, and they merely make the proof of incidents and details unnecessary. In the recent case of *Caffy* v. *Tindall,* 56 So. 177, the lower court charged the jury as follows: The law presumes, and in the absence of evidence to the contrary, conclusively presumes, that Bill Caffy, if he was sane, knew that real estate would not pass under a nuncupative will. The court in holding this charge error, remarked: "In this action, the knowledge, or want of knowledge, on the part of testator, is a fact to be proven in the same manner that other facts are proven. The law does presume for some purpose that all persons know the law, but not for the purpose of supplying evidence of a fact material to the controversy." So here, the unconstitutonal Madison Act was on the statute books, and of course the assesor, the clerk and the board of supervisors could have

followed that act, though unconstitutional, in making the assessment, altho, in the lids of the Code of 1880, there was a valid assessment act which these officers should have followed; and yet the court is asked to presume that the officers follow the invalid act, and thus supply a fact that the defendant must have pleaded and proven to sustain his case, and to do this in the face of the want of either pleading or evidence. The presumption that all men know the law is no stronger than a presumption that an officer will do his duty, but no presumption can supply the evidence of an affirmative fact material to the controversy. Presumptions never do the like of that. *Fotheree* v. *Lawrence,* 30 Miss. 416; *Jones* v. *Rogers,* 85 Miss. 802.

We have already alluded to the fact that when the Madison Act was passed, there was a valid assessment law found in the Code of 1880, on which the assessment of 1883 and 1887 had been made, and on which all subsequent assessments should have been made, because the valid law could not possibly have been repealed by the unconstitutional law, a matter to which we will refer more at length later on, and we only make reference to that fact now to invoke a presumption that is destructive to defendant's motion. *Marshall* v. *Stevens,* 47 Am. Dec. 601; Sections 1982-1983-4332, Code 1880. Now, if counsel are right in their argument that the officers must be presumed to have made the assessment under the invalid Madison Act, what then was the use of sec. 1983 at all, which, it has been admitted, changed the rule of evidence? The presumption they are confronted with is that the assessor legally listed the property, legally filed his assessment with the board of supervisors, and that legal notice was given to the taxpayers to object, that the assessment roll was legally approved, the levy legally made, and that the taxes were not paid by the owner to the sheriff. We have the right given by statute to invoke all of these presumptions, while they have no right

to invoke the presumption that these officers followed, in making these assessments, the invalid law, with the counter-presumption staring them in the face. Counsel, to sustain their presumptions, invoke the doctrine of *Day* v. *Smith,* 87 Miss. 395, but that case justifies no such deduction. The foundation of the presumption in the case of *Day* v. *Smith,* is found on page 407, where the court says: "The court takes judicial knowledge of the condition of the country in 1861, of what the *status,* the actual *status* of Mississippi was, at that time. The United States supreme court, and all other courts of the Union, judicially knew that war was flagrant, and that Mississippi had a *de facto* government with *de facto* officials, which officers were bound necessarily to execute the mandates of the *de facto* government, the one in power and exercising authority. The acts of the legislature in aid of the confederacy were of course void in law."

It is fundamental law of government that it must have power to tax, without which the government would instantly perish. *McCullock* v. *Maryland,* by Cheif Justice MARSHALL, 4 Wheaton, 428; *Kirkland* v. *Hotchkiss,* 25 Law. Rep. 558.

The Madison Act was only so much waste paper; it did not so much as repeal the valid law found in the Code of 1880; it accomplished nothing, because the legislature had no power to make it, as has been repeatedly decided. An unconstitutional act can neither tear down nor build up. *Carr* v. *The State,* 22 Am. St. Rep. 524. Of course the state must have in existance, at all times, a valid revenue law, through whose agency it can compulsorily collect its revenues. When the invalid Madison Act was enacted, it had no effect whatever upon the valid law found in the Code of 1880. That law stood without a word or syllable changed, and it became the duty of every officer to continue to follow it, and not the invalid law; and then, when a litigant comes in to assert the invalidity of the revenue laws of the state, the decisions simply

say that he must prove it. *State* v. *Blend,* 16 Am. St. Rep. 411; *Randolph* v. *Supply Co.,* 17 So. 721; *Carr* v. *The State,* 22 Am. St. Rep. 624; 11 L. R. A. 307; *State* v. *Benziner,* 20 L. R. A. 87. Counsel refer to sundry cases on pages 4 and 5 of their brief, all of which we have examined carefully, but we think no reference or discussion need be made to, or of, any of them, except the following which we find to hold the Madison Act void: *Hawkins* v. *Mangum,* 78 Miss. 97; *Butts* v. *Ricks,* 82 Miss. 533; *Coffey* v. *Coleman,* 85 Miss. 14; *Scharborough* v. *Elmer,* 87 Miss. 508; *Eastland* v. *Lumber Company,* 90 Miss. 33; *Hamner* v. *Yazoo, etc.,* 56 So. 466; 100 Miss. 349.

The fundamental fallacy of the assumption of counsel here is in assuming "that the general law of assessment in force during the years 1889, 1890, 1891 and 1892, was the Madison Act." There is no dispute that the Madison Act was absolutely void and has no more effect than so much waste paper, that the pages on which it is printed may just as well have been left out, left without a letter or word upon them, leaving the general revenue laws of the Code of 1880 in full vigor and effect. How then can counsel say that this dead statute was a living one? To so argue would be to resurrect the miracle that occured in Mosaic times, when Aaron's rod budded. The dead thing cannot have life. And an unconstitutional statute cannot displace a legal and constitutional statute. This fundamental and erroneous assumption lays at the root of counsel's whole brief, and when that error is punctured, the entire argument collapses and leaves nothing whatever standing.

SMITH, C. J., delivered the opinion of the court.

Appellee instituted this suit in ejectment in the court below and at the close of the evidence the court instructed the jury to find in his favor, and there was a verdict and judgment accordingly. After issue joined each party

demanded of the other in writing "a bill of particulars of his claim of title to the premises in question," which demand was by each complied with. Each claimed and proved on the trial a record title, appellee's title being traced through a sale to the state by the tax collector in 1892 for the taxes of the preceding year. Appellant, in addition showed possession in himself and in the parties to the deeds through which he claims. What occurred at the close of the testimony can best be stated in the language of the bill of exceptions:

Counsel for plaintiff: "We move to exclude this testimony and for a peremptory charge."

Counsel for defendant: "So do we. We won't let you have any advantage of us in that."

Motion of plaintiff sustained, to which the defendant excepted.

Counsel for defendant: "We now ask that we be allowed to reopen the case and show that this land was sold under an assessment under the Madison Act."

Motion overruled, to which the defendant excepted.

Counsel for defendant: "We offer in evidence the fact that this land was assessed and sold under the Madison Act."

The court overruled that motion on the ground that the bill of particulars did not warrant such testimony.

Counsel for defendant: "Counsel now then moves the court to permit him to amend his bill of particulars to show that from the records of Monroe county that the land in question was assessed under the Madison Act, and the land was sold because the taxes for the year were not paid."

Motion overruled, to which the defendant excepted.

The Madison Act, referred to in this bill of exceptions (chapter 9 of the Laws of 1888) entitled "An act to equalize assessments in the different counties in the state," was repealed in 1892 after the tax sale here in question, and was declared void under the Constitution of 1869 in *Hawkins* v. *Mangum,* 78 Miss. 97, 28 So. 872.

The grounds upon which appellant seeks a reversal of the judgment of the court below are: First, that the court should have presumed that the sale in question was based upon an assessment made under the provisions of the Madison Act, and therefore void; second, if the court could not so presume the case should have been reopened, and he should then have been permitted to introduce testimony showing that the assessment was in fact made under the provisions of the Madison Act; third, that if necessary he should have been permitted to amend his bill of particulars. The argument of counsel for appellant in support of the first of these grounds is that until the contrary is made to appear, civil officers, including tax assessors and collectors, are presumed to obey the laws enacted by the legislature without reference to their constitutionality, leaving that matter to be determined by the courts; and therefore, since the assessment and sale of the land in question was made before the Madison Act was repealed, there being no evidence to the contrary, the court must presume that the assessment was made under the provisions of this act, and that the sale is therefore void.

We are relieved from determining whether such a presumption as that here invoked does ordinarily arise, for the reason that it is provided by section 1983 of the Code that:

"A conveyance made by a tax collector to an individual purchaser of land at a sale for taxes, and the list of lands sold to the state at such sale, shall be *prima facie* evidence that the assessment and sale of the land were legal and valid."

Notwithstanding the adoption of the Madison Act the then existing general law governing the assessment of land for taxes remained in force, under which a valid assessment could have been made. This being true, the list of land sold to the state and introduced in support of appellee's title is *prima facie* evidence that the assess-

ment under which the land was sold was made under the then still existing valid law.

While *Coffee* v. *Coleman*, 85 Miss. 14, 37 So. 499, is not directly in point, for the reason that in that case the bill charged specifically that the assessment was valid, the result here reached must be the same as was reached there, for the reason that a *prima facie* case made by evidence is equally as effective, until overturned, as one made by allegations in a bill to which a demurrer has been interposed.

Apppellant's motion to reopen the case and for leave to introduce testimony showing that the assessment was in fact made under the provisions of the Madison Act should have been sustained. The ground upon which appellee seeks to uphold the act of the court below in overruling this motion is that the application to amend the bill of particulars came too late. The defect in this position is that it was not necessary for appellant to have amended his bill of particulars in order to make competent the evidence he sought to introduce. This evidence was intended, not to establish any link in appellant's chain of title, but to show the invalidity of one of the deeds through which appellee claims.

Section 1827 of the Code, under which the bill of particulars here in question was demanded, contemplates only that either party shall inform the other, when requested so to do, of the evidence, documentary or verbal, by which he expects to establish his own title, or, rather, of the deeds or other sources of title through which he claims, and not that he shall inform the other party of evidence which he will introduce in order to show the invalidity of any deed or other source of title through which such other party claims. For instance, if the defendant intends to introduce testimony showing that one of the deeds under which the plaintiff claims title is a forgery, it is not necessary for him to advise the plaintiff of this fact by including a reference thereto in the ab-

stract of title and bill of particulars furnished the plaintiff in response to a request therefor.

Reversed and remanded.

MRS. L. S. COCHRAN *et al v.* PATRICK HENRY.

[65 South. 213.]

1. ATTORNEY AND CLIENT. *Wills. Contracts. Lien. Right to probate will. Settlement of lawsuit.*

Where the sole beneficiary under an unprobated will contracted with an attorney for services for its probate, and obligated herself to pay to the attorney one-half of whatever might be decreed to be the interest of the beneficiary under such will and bargains, sells, assigns, transfers, and sets over to the attorney one-half of whatever lands, moneys, choses in action, and personal property she may be entitled to receive under a decree of court or settlement such a contract does not give to the attorney a lien on the property under the will, and he does not acquire an interest in the will, and cannot propound it for probate.

2. ATTORNEY AND CLIENT. *Contract. Settlement of lawsuit.*

A contract between attorney and client, whereby the client binds himself not to compromise or settle a pending or prospective lawsuit, is unenforceable.

APPEAL from the chancery court of Issaquena county.

HON. E. N. THOMAS, Chancellor.

Suit by Patrick Henry against Mrs. L. S. Cochran and others. From a decree overruling the demurrer to complainant's bill, defendant appeals.

The facts are fully stated in the opinion of the court.

McLaurin, Armistead & Brien and *McLaurin & Thames,* for appellant.

The attorneys for appellants filed an elaborate brief citing 3 A. and E. of Law (2d Ed.), p. 337;

4 Cyc., p. 45 *et seq.; Christmas* v. *Russell,* 14 Wall. 69-84, 20 L. Ed. 762; *Trist* v. *Child,* 21 Wall. 441, 22 L. Ed. 623; *Dillon* v. *Barnard,* 21 Wall. 430, 22 L. Ed. 673; 25 Cyc. 660 *et seq.; Wright* v. *Ellison,* 1 Wall. 16, 17 L. Ed. 555; *Pratt* v. *Hargreaves et al.,* 76 Miss. 955-969, 25 So. 658, 71 Am. St. Rep. 551; *Jones* v. *Moseley,* 40 Miss. 261-265, 90 Am. Dec. 327; *Slocum* v. *Grandin,* 38 N. J. Eq. 485-488; *Ex parte Crafts,* 28 S. C. 287, 5 S. E. 718; *In re Miller's Estate,* 166 Pa. 97, 31 Atl. 58-62; *Fotheree* v. *Lawrence,* 30 Miss. 416; *Rothschild* v. *Hatch,* 54 Miss. 554; *Shirk* v. *Neible,* 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; *Matter of Snyder,* 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441; *Davy* v. *Fidelity & Casualty Insurance Co.,* 78 Ohio St. 256, 85 N. E. 504, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694; *Thompkins* v. *Nashville etc., Railway Co.,* 110 Tenn. 157, 72 S. W. 116; *Huber* v. *Johnson,* 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; *Breathitt Coal, Iron & Lumber Co.* v. *Gregory* (Ky.), 78 S. W. 148; *Johnson* v. *Ravitch,* 113 App. Div. 810, 99 N. Y. Supp. 1059; *Id.,* 113 App. Div. 1123, 100 N. Y. Supp. 1123; *Weller* v. *Jersey City, H. & P. St. Railway Co.,* 68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442; *Id.,* 66 N. J. Eq. 11, 57 Atl. 730.

Catchings & Catchings, for appellee.

The attorneys for appellee filed an elaborate brief citing *Hoffman* v. *Vallejo,* 45 Cal. 564; *Harris* v. *Oil Mills,* 78 Miss. 603, 30 So. 273; *Holmes* v. *Evans,* 129 N. Y. 140, 29 N. E. 233; *Wells* v. *Railroad Co.,* 96 Miss. 193, 50 So. 628, 27 L. R. A. (N. S.) 404; 4 Cyc. p. 42 *et seq.;* 19 Am. and Eng. Ency., p. 13; *Nutt* v. *Knut,* 200 U. S. 12, 26 Sup. Ct. 216, 50 L. Ed. 348; *Jeffries* v. *Mutual Ins. Co. of N. Y.,* 110 U. S. 305, 4 Sup. Ct. 8, 28 L. Ed. 156; *Gulf, C. & S. F. R. Co.* v. *Miller,* 21 Tex. Civ. App. 609, 53 S. W. 709; *Walker* v. *Walker,* 125 U. S. 342, 8 Sup. Ct. 929, 31 L. Ed. 769; *St. L. M. & Co.* v. *Montana Min. Co.,* 171 U. S. 650,

19 Sup. Ct. 61, 43 L. Ed. 320; *U. S.* v. *Trans-Mo. Freight Ass'n,* 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Ft. Worth R. Co.* v. *Carlock & Gillespie,* 33 Tex. Civ. App. 202, 75 S. W. 931; *Davis* v. *Webber,* 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81; *Texas Central R. Co.* v. *Andrews,* 28 Tex. Civ. App. 477, 67 S. W. 923; *Railroad Co.* v. *Miller,* 21 Tex. Civ. App. 609, 53 S. W. 709.

COOK, J., delivered the opinion of the court.

Charles C. Sanford, a white man died May 27, 1912, owning two valuable plantations situated in Sharkey and Issaquena counties and also personal property of considerable value. Some years before his death he executed his last will and testament, devising and bequeathing to Lillie Daisy Brown, a negro woman, his entire estate, real and personal, reciting in his will that it was his purpose thereby to reward a faithful servant. The testator's three sisters and a brother survived him, they being his heirs at law.

Lily Daisy Brown employed Judge Patrick Henry, an attorney at law, to represent her in and about the probating of the will. The contract of employment was reduced to writing and signed by Lily Daisy Brown, and is as follows:

"State of Mississippi, County of Warren. For and in consideration of five dollars cash in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of the services rendered to me and to be rendered to me by Pat Henry, attorney at law, of the city of Vicksburg, county and state aforesaid, representing me and my interest which that certain will and writing signed, published, executed, and declared on the 14th day of June, 1900, by one C. C. Sanford, deceased, wills, devises, and bequeaths me and in enforcing the provisions of said will, by which and through which all of the estate, both real and personal, of the said C. C. Sanford,

late of the county of Issaquena, state of Mississippi, was by said will devised and bequeathed to me.

"I now of my own free will and accord do, in consideration as aforesaid, hereby agree, obligate and bind myself to pay to said Pat Henry, attorney at law as aforesaid, one-half (½) of whatever the courts of the state of Mississippi may by decree or judgment or otherwise declare to be my interest in said estate of the said C. C. Sanford, so willed, bequeathed, and devised to me as aforesaid. And I hereby, in consideration as aforesaid, further obligate myself not to compromise, assign, or sell, or by any writing which may operate as an assignment, sale, or compromise, any of my said interest in said estate without the joint signature and the consent in writing of the said Pat Henry aforesaid is first obtained and given by him.

"The intention and purposes of this writing being that I hereby bargain, sell, assign, transfer and set over to the said Pat Henry one-half (½) or fifty (50) per cent. of whatever in lands, moneys, choses in action and personal property that I may be entitled to receive by and through that certain writing dated on the 14th day of June, 1900, and signed and declared by C. C. Sanford to be his last will and testament, either by judgment or decree of any court, or by whatever compromise or settlement which may be entered into by me after the consent of the said Pat Henry is first had and obtained. And to enforce the provisions of this agreement I hereby acknowledge a lien upon all property, both personal and real, choses in action and otherwise which may be bequeathed or adjudged to be coming to me through the provisions of said will, and I hereby further nominate and appoint the said Pat Henry my full, lawful, and legal attorney in fact to sign my name, and to receipt for any moneys which may be or hereafter become due to me by and through the said will of the said C. C. Sanford, deceased, and do hereby give said attorney full power to commence or institute

action either at law or equity or to defend or litigate any action or suit that may be brought against me as the devisee, legatee, or the beneficiary under the will of said C. C. Sanford as aforesaid, in any court of law or equity with full power to said attorney of accepting or serving affidavits on oath; giving to the said Pat Henry full and unlimited power to act for me and in my stead, with the power to him to sign my name to any deed or other instrument of writing, or to collect any funds or any amount in lieu of any property to which I may be entitled, and to sign my name and receipt in satisfaction thereof. And with the power to him, the said Pat Henry, to compromise or arbitrate any litigation or right of action or rights which I may have under and by virtue of the said will so signed on the 14th day of June, 1900, by the said C. C. Sanford.

"And in consideration of all of which I hereby promise to corroborate and approve of all actions done and performed by him in this regard, in the matter of the said estate, as same were done and performed by me, all interlineations made and written before the signing hereof.

"Witness my signature this 15th day of June, A. D., 1912. LILLIE DAISY BROWN.

"Witnesses:

"D. V. Solari.

"J. B. Benton."

This instrument was properly acknowledged and duly recorded on the record of deeds of Issaquena county on the 6th day of July, 1912.

The will was in due time offered for probate. In the meantime the brother and sisters of the testator, anticipating that some will might be offered for probate, had filed with the clerk this objection to the probating of the will of C. C. Sanford, vix.:

"To the Honorable Chancery Court of Issaquena County, Mississippi: We, the undersigned attorneys for

Mrs. L. S. Cochran, Robert Sanford, Mrs. H. C. Burch, and Mrs. Alberta Foolkes, heirs of C. C. Sanford, deceased, having become advised that there is probably a pretended will said to have been left by the said C. C. Sanford. Now, therefore, we, as said attorneys aforesaid, acting for the heirs aforesaid, do hereby protest against and object to the probating of said will, according to section 1990 of the Code of 1906, if said will be filed for probate."

It seems that the clerk, on June 22, 1912, admitted to probate the document purported to be the will of Sanford, but declined to issue letters testamentary to Lillie Daisy Brown, who was named therein as executrix, without bond. It appears that the objection to the probate was treated as a *caveat,* but no issue *devisavit vel non* was ever made up or tried.

On the 9th day of July, 1912, Lillie Daisy Brown executed the following deed of conveyance, viz.:

"I convey and quitclaim unto C. W. Cochran all right, title, claim, or interest I may own or have any right to in that certain tract of land situated in Issaquena county, Mississippi, and known as the 'Dixie Plantation,' which plantation was owned by the late C. C. Sanford at the date of his death, and for the same consideration I convey, sell, and deliver by this instrument all right, title, claim, or interest I may own or have any right to in all the personal property of every kind and description owned by me or the late C. C. Sanford at the date of his death, and situated on said 'Dixie Plantation,' and in the possession or use of either myself or the said C. C. Sanford at the time of his death; it being my intention by this instrument to convey, sell, and deliver to the said C. W. Cochran all right, title, claim, or interest I may own or be entitled to in all of said real and personal property owned by the said C. C. Sanford at the time of his death, and attempted to be given to me by a will of the said C. C. Sanford which I have exhibited for probate in the

chancery clerks office of said Issaquena county, Mississippi; also all other personal property situated on said 'Dixie Plantation' which I may own or have any right, title, or interest in, independent of the said will of the said C. C. Sanford, except my household effects.

"Witness my signature this the 9th day of July, 1912.

LILLIE DAISY BROWN."

The bill of complaint in this case was filed by Judge Henry, and, after setting out the facts as above stated, together with other facts not necessary to state, it is alleged that the contract executed by Lillie Daisy Brown conveyed to him a one-half interest in the land belonging to C. C. Sanford, deceased, and devised by deceased to Lillie Daisy Brown; that her deed of conveyance to C. W. Cochran, executed on the 9th day of July, 1912, did not convey his interest in the land; that by the terms of her contract Lillie Daisy Brown did not have any power to compromise or settle the matters growing out of the objections to the probate of the will of Sanford; that his contract with Lillie Daisy Brown was of record when she executed the conveyance to Cochran, and, besides, Cochran had actual knowledge of the existence and of the terms of the contract. In short, the bill of complaint avers that Judge Henry, by the contract, acquired an interest in the land, and that Lillie Daisy Brown's deed to C. W. Cochran did not, in any way, affect his interest, and this, being true, the court was asked to declare the instrument offered for probate as the last will and testament of C. C. Sanford, and that the same be admitted to probate.

The brothers and sisters of C. C. Sanford and C. W. Cochran were made parties defendant to the proceedings, and a demurrer was interposed by them to the bill of complaint, assigning the following grounds:

"(1) Because there is no equity on the face of the bill.

"(2) Because by the bill and exhibits thereto the obligation pleaded, whereby it is set up that Lillie Daisy

Brown, the party with whom the complainant is alleged to have had the contract, obligated herself not to compromise, assign, or sell, or by any writing which may operate as an assignment sell or compromise, any of said interest in said estate without the joint signature and consent in writing of the said Pat Henry (complainant) aforesaid first obtained and given by him, is void and of no binding effect upon the said Lillie Daisy Brown to prevent her from selling her interest to anybody she chose.

"(3) Because the assignment claimed to have been taken from Lillie Daisy Brown by the complainant, Patrick Henry, is of date the 15th day of June, 1912, and is inoperative and void, for the reason that said interest was not taken 'after suit had been filed thereon,' as provided by section 718 of the Code of 1906.

"(4) Because by the terms of said contract had with complainant and Lillie Daisy Brown of date June 15, 1912, it is provided that the said Lillie Daisy Brown, obligates and bind herself to pay said Pat Henry, complainant, 'one-half of whatever the courts of the state of Mississippi may, by decree or judgment, or otherwise, declare to be my (her) interest in said estate of said C. C. Sanford,' and said contract is of no force or operation without such decree or judgment.

"(5) Because by the terms of said contract it is provided that the said Lillie Daisy Brown sells, assigns, transfers, and sets over to the said Pat Henry 'one-half or fifty per cent. of whatever in lands, money, choses in action, and personal property that I (she) may be entitled to receive by and through the will of the said C. C. Sanford, either by judgment or decree of any court, or by whatever compromise or settlement which may be entered into by me after the consent of the said Pat Henry first had and obtained,' and by this provision in said Lillie Daisy Brown's contract she reserved the right to compromise and sell her said interest

as claimed in the estate of C. C. Sanford; the provision attached requiring the consent of said Pat Henry being void under the law, and reserving the right by said contract to compromise and sell her interest, a sale by her divested any interest that the said Pat Henry might have in said land under said contract.

"(6) Because said writing signed by Lillie Daisy Brown, called a 'power of attorney and contract' by the parties in its caption, is not an absolute assignment of any interest in the property claimed to be devised and bequeathed to her, by the said C. C. Sanford by his alleged will, but is simply a contract to pay half of whatever sum she might recover by judgment or decree or compromise or settlement; and a lien is sought to be given in the face of this contract 'on all property, both real and personal, choses in action and otherwise which may be bequeathed or adjudged to be coming to me (her) through the provisions of said will (of the said C. C. Sanford),' and the provision declaring a lien divests the right of any absolute assignment to the said Pat Henry, and he therefore has no interest in the property itself by virtue of said contract; said contract executed by the said Lillie Daisy Brown on the 15th day of June, 1912, to the said complainant, Patrick Henry, is, in legal effect, nothing more than a contract of employment of an attorney, and conveys no interest in the land whatever, as appears from the face of the instrument itself.

"(7) Because said contract signed by the said Lillie Daisy Brown on the 15th day of June, 1912, is void as an assignment of any interest in the property described in the bill.

"(8) Because the complainant has no interest in the property described in the bill which would entitle him to maintain this suit for the probate of the alleged will of the said C. C. Sanford, and is not entitled to maintain said bill for said purpose.

"(9) Because said contract executed by the said Lillie Daisy Brown on the 15th day of June, 1912, made exhibit to the bill, is nothing more than a written contract for the employment of an attorney and an effort to give a lien on property not described, to secure said attorney's fee, and, in legal effect, has no operation to transfer to said attorney any interest or title in the property described in the bill in this cause.

"(10) That the complainant has no right to maintain this bill.

"(11) And for other causes to be shown on the hearing."

The contract between Lillie Daisy Brown and her attorney, Judge HENRY, analyzed in the light of the allegations of the bill of complaint filed by Judge Henry, amounts to about this: The testator being a white man, it was not unnaturally assumed that his heirs at law would contest his will, in which he devised and bequeathed to his servant, a negro woman, his entire estate, and, in anticipation of this event, Judge Henry had the beneficary of the will to "obligate and bind" herself "to pay to said Pat Henry, attorney at law as aforesaid, one-half of whatever the courts of the state of Mississippi may by decree or judgment or otherwise declare to be my interest in the said estate of the said C. C. Sanford." Thus far the contract is unambiguous and explicit. Judge Henry's compensation for his services to be rendered is fixed at one-half of what the future lawsuit would pan out to Lillie Daisy. There is no attempt to convey a present interest in the lands of the testator; nor is there any conveyance of the cause of action. If the courts should decree that the will offered for probate was the last will and testament of C. C. Sanford, she would thereby be invested with the title to all of the estate of the said Sanford, and she would then be bound to convey to Judge Henry an undivided one-half interest in the same, or pay to him the value of such interest.

It is contended, however, that a subsequent clause of the contract interprets the purpose of the contracting parties, and clearly conveys or assigns to Judge Henry a one-half interest of the property. This clause reads this way:

"The intention and purposes of this writing being that I hereby bargain, sell, assign, transfer and set over to the said Pat Henry, one-half (½) or fifty (50) per cent. of whatever in lands, moneys, choses in action and personal property that I may be entitled to receive by and through that certain writing dated on the 14th day of June, 1900, and signed and declared by C. C. Sanford to be his last will and testament, either by judgment or decree of any court, or by whatever compromise or settlement which may be entered into by me after the consent of the said Pat Henry is first had and obtained."

We find ourselves unable to so construe this clause. While the words "bargain, sell, assign, transfer, and set over" are employed, it seems clear there is nothing more than an agreement that Judge Henry was to get one-half of what the courts should decree to Lillie Daisy, or one-half of whatever she could secure by compromise or settlement. The interpretative clause does not add to or subtract from the clause it undertakes to define, and merely expresses the same thing in different language. The briefs both for appellants and appellee are exceptionally able and exhaustive upon every phase of the controversy.

The decisions of all the courts upon contracts of this character are collated and analyzed in the briefs, but it is believed that the question here involved is put at rest in this state by the decision of this court in *Mosely* v. *Jamison*, 71 Miss. 456, 14 So. 529. The contract between the attorney and client construed in *Mosely* v. *Jamison, supra,* was in parol, but it was in all essentials the same as the contract we are considering in this case. The opinion of the court in that case is short, but, read in connection with the statement of facts, there is no room

for doubt that the contract there, as here, was that the attorney was to get for his services one-half of the recovery, and that the client had contracted that he would not compromise the suit without the attorney's consent. In *Mosely* v. *Jamison,* the controversy was between the attorney and client, and the court held that the client had a right to compromise his lawsuit without the consent of his attorney, although he had agreed not to do so, and, further, that the defendant in the suit was discharged by the settlement. This case seems to be in harmony with the weight of authority that a contract between attorney and client, whereby the client binds himself not to compromise or settle a pending or prospective lawsuit, is unenforceable. Be that as it may, *Mosley* v. *Jamison* so declares the law to be in this state. *Harris* v. *Hazelhurst Oil Mill,* 78 Miss. 603, 30 So. 273, and *Wells* v. *Edwards House,* 96 Miss. 191, 50 So. 628, 27 L. R. A. (N. S.) 404, are not in conflict with *Mosely* v. *Jamison, supra,* and neither are they applicable to the facts of the present case.

It may be that Judge Henry is entitled to recover one-half of the amount which was paid to Lillie Daisy Brown for her quitclaim of her interest in the estate of Sanford, but this question is not involved in this proceeding. The bill of complaint proceeds upon the theory that Judge Henry owns a one-half interest in the estate of Sanford, and, in order to make his title to the land clear, he asks the court to so decree, and also propounds the will for probate upon the theory of his interest in the estate bequeathed by the will. If the contract executed by Lillie Daisy Brown does not convey to Judge Henry an interest in the property in controversy, and does not assign to him any part of the cause of action, it follows that he is not "interested in the will," and therefore cannot propound it for probate.

The decree of the chancellor overruling the demurrer is reversed, and the bill dismissed.

Reversed.

MARY ANN DAVIS *et al.* *v.* SALLIE S. DAVIS *et al.*

[65 South. 241.]

WILLS. *Construction. Conditional bequests.*

Where deceased, whose wife had left him and filed a bill for divorce, on entering a hospital to have an operation performed, wrote his parents a letter, stating that if he did not recover, he wanted them to take charge of everything he had; that he loved his wife dearly and that unless she showed that she loved him, he was going to give her up; that as it then stood, he did not want her to have it. He, however, recovered from the operation, and returned to his work as a railroad employee, and was killed. In such case deceased did not intend to make an unconditional bequest of his property, but only a bequest to take effect if he should not recover from the operation he was then about to undergo.

APPEAL from the chancery court of Monroe county.

HON. J. Q. ROBINS, Chancellor.

Bill by Mary Ann Davis and others against Sallie S. Davis and others. From a decree for defendants, complainants appeal.

Appellants were complainants in the court below, and appellees were defendants.

The bill alleges: That complainants are the father and mother, respectively, of one Henry J. Davis, deceased, and that defendant Mrs. Sallie Stevens Davis is the widow of Henry J. Davis, and that about July 1, 1911, said defendant deserted Henry J. Davis, and refused to live with him as his wife, and that about December 5, 1911, she filed a bill for a divorce. That defendant was served with process on January 9, 1912, and on January 16th filed his answer to said divorce suit, and that, while same was still pending, to wit, in December, 1912, defendant, who was an employee of the St. Louis & San Francisco Railroad Company, went to a hospital maintained by said railroad company, for the

purpose of having an operation performed, and that while at said hospital, before he was operated on, he wrote a letter to his mother, one of the complainants herein, which letter is offered for probate as his will, and which is as follows:

"Dear Mother: No doubt you will be surprised to learn that I am here for the operation I have needed for some time. The rupture has been troubling me a great deal lately, and I decided very suddenly to come, or I would have written you before this. I am at the Frisco Hospital, and from the outlook I judge I am going to be well taken care of, so please don't be worried about me. I have not had a line from Sallie since she left me. So many of the men's wives are here with them, and it makes me feel more despondent than ever to think how my wife is treating me. However should she ever come back to me and does not do— . . . Better we will separate. I love her dearly, but unless she shows she loves me I am going to give her up. She left me because I fussed with her and refused to get up and make a fire while I was mad.

"Should I not get over this operation, I want you and Papa to take charge of everything I've got, sell my pool room for about five hundred dollars at least, and I have eight hundred dollars in the M. & F. Bank of Amory, and a Frisco check of seventy-five dollars due on the 15th, and you know what I have in Columbus. My B. R. T. money is now delinquent and you cannot get that, but I have nearly got it straightened up again. Had Sallie treated me as a loving wife always treats her husband, she might have gotten all I have, but as it stands to-day I certainly do not want her to have it. She has cost me over a thousand dollars already. Well I shall write her a few lines now and let her know where I am. Hope all are well as usual. Bye bye, Henry.

"Sallie has her pass from Greenwood to Amory via Birmingham."

That said Henry J. Davis recovered from his operation and returned to work as an employee of said railroad company, and, while in the employ of said company and engaged in his duties, he was killed by a train of said railroad company; his death being alleged to be due to the negligence and carelessness of the servants of said railroad company. The bill further alleges that his widow has qualified as administratrix of the estate of said Henry J. Davis, and has filed suit against the said railroad company for damages for his death, and is seeking to take charge of certain property left by said Henry J. Davis, and is collecting money due him and converting same to her own use.

The bill makes the railroad company a party defendant, and prays that Mrs. Sallie Stevens Davis be restrained from prosecuting her suit against the railroad company or from taking charge of or converting any of the property left by him to her own use, and that the railroad company be restrained from making any payment to said Sallie Stevens Davis, and prays also that the letters of administration granted to his widow be canceled, and that the letter herein referred to be admitted to probate as the will of said Henry J. Davis, and the complainants be named as executors of said will.

Both defendants demurred to the bill, the principal ground of demurrer being that the letter referred to was, in fact, not a will, since, if it was ever intended as a will, the contingency upon which its validity depended had never happened, since he did not die of the operation, but fully recovered and returned to his work, and that the defendant Mrs. Sallie Stevens Davis was the lawful heir of deceased, there being no children, and that, even if said will was valid, it did not deprive the widow of her right under the statute to bring an action against the railroad company for the death of her husband.

The court sustained both demurrers, and, complainants declining to amend their bill, the court entered a decree dismissing same, from which this appeal was prosecuted.

D. W. Houston, Sr., & D. W. Houston, Jr., for appellants.

The only point stressed or seriously contended for in the court below, against allowing this letter to be established as Henry J. Davis's will, was that it was a contingent or a conditional will, and that was the ground upon which the court below sustained the demurrers, the court stating, in effect, at the time, that, while the later and more modern decisions would seem to sustain this will as valid and as not contingent, he felt bound by the decision in *Magee et al.* v. *McNeill,* 41 Miss. 17.

We will discuss this case later on in our brief, as we first want to cite and quote other authorities to show the general doctrine.

In trying to arrive at the intention of the testator (which is the guiding star), instead of taking all of the language of this instrument and construing all of it together, and as a whole, counsel selected seven words of said letter, to wit: "Should I not get over this operation" and, after having segregated and separated them from all of the other words used by Henry J. Davis, the writer of said instrument, to express his intention and meaning, counsel asked that these seven isolated words be taken by themselves, disconnected from the other words of this instrument, and that the court decide that this renders this instrument a contingent will, and declare it invalid.

We will also discuss later the fallacy of this method of arriving at the intention of the testator, but desire now to show that, even when these words are taken separately and by themselves, they merely express the circumstan-

ces under which the will was made, or the occasion of the making, or the inducement which led him to make, said will; that the operation was merely the occasion or inducement of making the will. We quote below 30 Am. & Eng. Ency. of Law (2 Ed.), pp. 553-4, as follows: A contingent or conditional will is one so drawn as to become operative only upon the happening or not happening, or upon the existence or non-existence, of a certain set of circumstances, during a certain period of time, so that if the contingency fails or occurs, the will is or is not entitled to probate, as the case may be. But the intention of the testator to make a conditional will must appear very clearly on the face thereof; and before any will can be defeated upon the ground that it is conditional, and that the condition has failed, it must be determined: First, whether the contingency is referred to as the occasion of making the will, or as the condition upon which the instrument is to become operative, or, in other words, whether the intention of the testator is to make the validity of the will dependent upon the condition, or merely to state the circumstances and inducements which led him to make a testamentary provision; and, secondly, if the language clearly imports a condition, whether it applies to and affects the whole will or only some of its provisions. Thus, if the testator makes his will conditional upon his death during a particular period, which he survives, the will does not take effect. But if the possibility of death, within such period, is merely the motive for making a will prior thereto, the survival of the testator after the expiration of the period mentioned will not render the will invalid.

In note 3 to above in 30 Am. & Eng. Ency. of Law (2d Ed.), page 554, the cases are given as illustrating what language will import a condition, and in note 4 to same, the following expressions have been held merely expressive of the circumstances under which the will was made,

and not conditional: "In the event of my death whilst serving in this horrid climate or any accident happening to me," citing *In re Thorne,* 4 Sw. and Tr. 36. "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," citing *Goods of Dobson,* L. R. I. P. & D. 88. "In case of my death on the way," citing 6 P. D. 17. Goods of M. Being about to travel a considerable distance, and knowing the uncertainty of life; citing Traver, etc., 9 Pet. (U. S.) 174. To provide for possible contingencies, citing *Kelleher* v. *Kernan,* 60 Md. 440. "Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath," etc., citing *French* v. *French,* 14 W. Va. 458. "According to my present intention should anything happen to me before I reach my friends in St. Louis," citing *Ex parte Lindsay,* 2 Bradf. (N. Y.) 204. "Being physically weak in health, have obtained permission to cease from all duty for a few days and in the event of my death occurring during such time, I do hereby will and bequeath," citing *Goods of Martin,* L. R. P. & D. 380. "I am going on a journey and may not ever return, and if I do not this is my last request," citing *Eaton* v. *Brown,* 193 U. S. 411 (referred to below in brief). "Realizing the uncertainty of life at all times, and the dangers of accident to travel, I leave this as a memoranda of my wishes should anything happen to me during my intended trip," citing *Redhead* v. *Redhead,* 83 Miss. 141.

We respectfully submit the language used in the cases last cited as illustrations is all very much more conditional and contingent than that used in the will of Henry J. Davis; and in view of this, and of the other cases to which we will call the court's attention, and in view of the rule of construction which prevails in such cases, we can hardly think that this court will decide that the present will is a conditional or contingent one. If possible the courts will construe a will as not con-

tingent; immediately following the text above, 30 Am. & Eng. Ency. of Law (2d Ed.), page 555, uses the following language: Rule of construction. The language of a will will be construed, if possible, as merely setting forth the circumstances which induced the testator to make a testamentary provision, rather than as creating a condition upon which it alone is to become operative; and, even where the language clearly imports a condition or the tendency is to restrain its operation to the particular provisions, rather than allow it to affect the entire instrument.

In note 1 on said page and note 1 on page 554 numerous cases are cited under the subheads, intention to make a will contingent must clearly appear, and construction against conditions.

Among other cases cited in said notes, are the cases of *Likefield* v. *Likefield,* 56 Am. Rep. (K. Y.), 909; and the case of *Eaton* v. *Brown,* 193 U. S. 411, 48 Law Ed. 732, both of which use this language: The rule is that courts will not incline to regard a will as conditional, if it can be reasonably held that the maker was simply expressing his inducement to make it, however inaccurate the language may be for that purpose, if strictly construed; and unless the words clearly show that it was intended to be temporary or contingent, it will be upheld.

William Baldwin, for appellants.

By the old standards, the old cases, the rule generally was, that where a testator referred to some special time, place or circumstances, as the starting out on a journey, or a spell of sickness, or some approaching danger, as relating to the making of his will, the courts applied it as a limitation of the intent of the testator and held that the intent was presumed to have passed away with the escape from the threatened evil, or the passing of the circumstances referred to; such is the trend of the

old English cases, and such rule was adopted generally in the courts of the United States, in the early cases.

The supreme court of this state acted in harmony with the ideas and cases of its time, and in the case of *Magee* v. *McNeill,* 41 Miss. 17, followed the rule then accepted.

The growth of the law since then has broadened, and the courts hold that because a testator refers to some threatened danger to him as relating to the making of the will, is no reason why his intent as expressed in his will should be limited to the period of the threatened danger.

The supreme court of Mississippi, has, like practically all of the courts of the United States, as well as the supreme court of the United States, adopted this view, and it is, so far as modern precedent can make it, the law; unquestionably the law of the land to-day. *Redhead* v. *Redhead,* 83 Miss. 143; *Buffington* v. *Thomas,* 84 Miss. 157.

Getting away from the decision of the supreme court of Mississippi, we find exactly the same growth and departure from the old rules of construction as regards contingent wills. 30 Am. & Eng. Ency. of Law, p. 553: 40 Cyclopedia of Law and Procedure, p. 1082.

Leftwich & Tubb, for appellee.

The authorities are abundant and the rule is well established, that a document of this sort cannot be admitted to probate as the last will and testament of the maker, unless it is clearly shown that the document was written *animo testandi,* and unless this testamentary intent clearly appears to the court, probate must be refused, and in establishing this testamentary intent, the paper itself must be looked to. It must stand or fall by what appears within the four corners of the document. *In re Richardson,* 94 Cal. 65, 118 Cal. 428, 62 Am. St. Rep. 244; *In re Richardson,* 94 Cal. 65;

Eaton v. *Brown,* 193 U. S. 411; *Magee* v. *McNeill,* 41 Miss. 17, 30 Am. & Eng. Ency. of Law (2d Ed.), 553-4.

1 Underhill, in his Law of Wills, in his treatment of contingent wills, sec. 8, says: "Page, in his recent work on wills, sections 60-64 inclusive, uses similar language giving numerous examples of cases held to be contingent, and others held not to be contingent." Both these authors, Underhill and Page, cite practically all of the cases referred to by counsel for appellants, including also the case of *Magee* v. *McNeill,* the case from our own court, 41 Miss. 17; *In re Thorn,* 4 S. W. & T. R. 36; *In re Dobson,* 1 L. R. P. & D. 88; *Traver* v. *Traver,* 9 Peters (U. S. 174), 9 Law Ed. 19; *Kelleher* v. *Kernan,* 60 Md. 440; *French* v. *French,* W. Va. 458; *Ex parte Lindsay,* 2 Bradf. (N. Y.), 204; *Cody* v. *Conly,* 27 Gratt. 313; *Skipwith* v. *Cabell,* 19 Gratt. 758, 783; 40 Cyc. of Law & Procedure, 1082, sec. 9; *Parson* v. *Lanoe,* 1 Vesey Sr. 189; *Wynn,* 2 S. W. & T. R. 147; *Roberts* v. *Roberts,* 2 S. W. & T. R. 337; *John Porter,* 2 P. & D. 22; *Robinson,* 2 P. & D. 171; *Lindsay* v. *Lindsay,* L. R. 2 P. & D. 459; *Hugo,* 2 P. & D. 73; *In re White,* Myr. Prob. Cal. 157; *Todd's Will,* 2 Watts & Sarg. (Pa.), 145; *Hamilton's Estate,* 74 Pa. 69; *Jeffries' Estate,* 18 Pa. Sup. Ct. 439; *Damon* v. *Damon,* 90 Mass. 192; *Jacks* v. *Henderson* (S. C.), 1 Dessus. 543; *Wagner* v. *McDonald,* 2 Har. & J. 346; *Robnett* v. *Ashlock,* 49 Mo. 171; *Cowley* v. *Knapp,* 42 N. J. Law 297; *Maxwell* v. *Maxwell,* 60 Ky. (3 Metc.), 101; *Dougherty* v. *Dougherty,* 61 Ky. (4 Metc.), 25; *Vickery* v. *Hobbs,* 21 Texas, 570, — Am. Dec. 238; *Dougherty* v. *Holscheider,* 40 Tex. Civ. App. 31, 88 S. W. 1113; *Oetjen* v. *Deimmer,* 115 Ga. 1005, 42 S. E. 388; *Magee* v. *McNeill,* 41 Miss. 17; *Dan Sauzay* v. *Dan Sauzag,* 65 So. 273.

There is no rule better established than that the courts will not write a will for the deceased, but will enforce and construe the will already made. It matters not what the circumstances may be, nor the hardships that

may result; the court will certainly close its eyes to all these things, and construe the will as written, taking the very language of it in plain, ordinary acceptation. We need to cite no authority to sustain these rules. They are elementary and too well-established, and counsel for appellants certainly will not controvert them. We submit that this alleged letter of Henry J. Davis ought to be denied probate, if for no other reason, for the reason that it was made to depend upon the contingency of his death as a result of the operation he was then about to undergo. This case was heard below by one of the most careful and painstaking chancellors who ever adorned the bench in Mississippi; his decision is clearly right, and ought now to be affirmed.

SMITH, C. J., delivered the opinion of the court.

In the letter sought to be probated as his last will and testament, which the reporter will set out in full, Henry J. Davis expressly stated that he loved his wife dearly, and the inference is clear from the language used that he hoped she would return to him, and that he would not have "to give her up." Construed in the light of these facts, it is clear that he did not intend to make an unconditional bequest of his property, but one to take effect only in the event he "should . . . not get over" the operation he was then about to undergo. That he intended this bequest to be a conditional one is made more certain by his use of the words, "As it stands to-day, I certainly do not want her to have it."

Affirmed.

J. D. BRYAN v. HENDERSON HARDWARE CO.

[65 South. 242.]

JUDGMENT. *Lien. Property covered. Debts. Code* 1906, *section* 819. The lien of an enrolled judgment upon the property of a defendant as provided in section 189, Code 1906, does not extend to cover the right to receive or recover a debt.

APPEAL from the circuit court of Monroe county.

HON. CLAUDE CLAYTON, Judge.

Suit by the Henderson Hardware Company against J. J. Dockery in which plaintiff issued a garnishment against Monroe county for a debt from the county to the defendant, and J. D. Bryan and others intervene. From a judgment for plaintiff in garnishment, claimants appeal.

Monroe county was indebted to J. J. Dockery on a road contract. Dockery had given to J. D. Bryan and the Nettleton Supply Company (who had obtained judgments against him) orders on the board of supervisors of said county for the total amount of the indebtedness of said county to him. The Henderson Hardware Company had obtained a judgment against Dockery, and this latter judgment provoked the controversy here. The Henderson Hardware Company issued a garnishment against the county, and the county answered, showing the amount of its indebtedness to Dockery, and paid the money due Dockery into court. The Nettleton Supply Company and Bryan were thereupon cited to appear and set up their claim to this money, which they did, delivering the orders given them by Dockery. Issue was joined, and the case went to trial, and the trial court dismissed the claim of appellants, holding that, since the enrolled judgment of the Henderson Hardware Company antedated the orders or assignments of the fund by Dockery

to appellants, and that since and that as judgments were a lien on all property, that the contract debt due Dockery by the county was property, and that therefore said enrolled judgment was a lien on the funds, and took precedence over the assignment of the claimants (appellants here), and entered judgment for the appellee. From this judgment, this appeal comes.

The question to be decided is whether or not an enrolled judgment becomes a lien on choses in action, such as the indebtedness due in this instance by the county to Dockery.

Section 819 of the Code of 1906 is as follows:

819 (757) Lien of Enrolled Judgments. A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment-creditor, his representatives or assigns, against the judgment debtor, and all persons claiming the property under him after the rendition of the judgment; and a judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled; but in counties having two judicial districts a judgment shall operate as a lien only in the district or districts in which it is enrolled.

Sections 1591 and 1593 of the Code of 1906, of the chapter Definitions and Rules, are as follows:

1591 (1513) Personal Property. The term "personal property" when used in any statute, shall include goods, chattels, effects, evidences of rights of action, and all written instruments by which any pecuniary obligation, or any right, title, or interest in any real or personal estate, shall be created, acknowledged, transferred, incurred, defeated, discharged or diminished.

1593 (1514) Property. The term "property" when used in any statute includes personal property as defined in section 1591, and also every estate, interest, and right, in lands, tenements, and hereditaments.

Leftwich & Tubb, for appellants.

The simple question decisive of this case in which the amount involved is small, but in which the principle involved is extremely important, is: Does an enrolled judgment effectuate a lien on choses in action as it admittedly does on movable chattels subject to seizure and lands? It will be observed in this case that J. J. Dockery was under contract with Monroe county, all as the agreed statement of facts discloses, made in 1911, to do certain road work in the fifth district of Monroe county, for which, when performed and the work accepted, Monroe county would owe him a certain sum of money. The work was afterwards performed, and on June 6, 1912, an order of the board was entered, awarding him the sum of one hundred and twelve dollars and fifty cents. On March 10, 1911, Dockery had given an order on the board which was filed with its clerk, for twenty-five dollars and ten cents, and on March 14, 1911, he had given two orders, to J. D. Bryan, for all that was coming to him except for the sum he had already ordered the board to pay the Nettleton Supply Company. These last two orders were duly filed on the 14th day of July, 1911; and these orders constituted an effective assignment of whatever sum was due Dockery by the board, and gave the assignees under the orders, a perfect right to sue in their own names. Code of 1906, sec. 717; 2 Am. & Eng. Ency. of Law (2d Ed.), 1059, 1060; 21 Am. & Eng. Ency. of Law (2d Ed.), 940.

The language of our present statute on enrolled judgments, Code 1906, sec. 819, is as follows: "819. Lien of Enrolled Judgments. A judgment so enrolled shall be a lien upon, and bind, all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor, his representatives or assigns against the judgment debtor, and all persons claiming the property under him after

the rendition of the judgment; and a judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled; but in counties having two judicial districts, a judgment shall operate as a lien only in the district or districts in which it is enrolled."

This provision of the Code is as old as the state; see same statute substantially, Code of 1892, sec. 757; Code of 1880, sec. 1737; Code of 1871, sec. 830; Code of 1857, article 261; Hutchinson's Code, page 81, Act of Jan. 23, 1824. The learned counsel below argued and the argument was accepted as sound by the court, that a judgment lien by section 819, binds all the property of the defendant, and by sections 1591 and 1593, of the Code of 1906, the word property, when used in any statute, shall include goods, chattels, effects, evidences of rights of actions, and all written instruments by which any pecuniary obligation or any right, title or interest in any real or personal property shall be created, acknowledged, transferred, incurred, defeated, discharged, or diminished. Sections 1591 and 1953, under the Chapter on Definitions and Rules in the Code of 1906, are in substantially the same words found as follows in the Code of 1892, sections 1513-1514; Code of 1880, sections 3107-2108; Code of 1871, sections 2858-2859; Code of 1857, page 630, article 351-352; we have not yet found the section of Hutchinson's Code which is likely due to bad indexing, but these sections may be considered as a material part of the body of our law, and have always been.

The learned counsel and the court below took too literal a view of the statute cited; they seem to overlook that the same code which must be construed harmoniously as a whole makes provision how the choses in action alone can be taken under an attachment or under garnishment on judgment. By sections 140 and 3965 of the Code, directions are given how an attachment shall be levied and choses in action seized under attachment writs; by sections 2342, 2343, under the chapter on Garnishments, it

is found how indebtedness of any sort may be garnished; and by section 2343, the language of the statute is: "And any indebtedness of the garnishee to the defendant can be appropriable to the satisfaction of the judgment or decree, or liable to be condemned in the attachment." If, in the very terms of that statute, the indebtedness is only bound from the time of the service of the garnishment, how can the court hold that the indebtedness is also bound from the time of the enrollment of the judgment? These statutes must be construed together, *pari pasu,* and all must be given effect having due references to the nature of the property seised and levied on. The thing impounded here by the garnishment of the Henderson Hardware Company is incorporeal and intangible, and from its very nature, a lien is not given by enrolling the judgment on the judgment roll. These garnishment statutes are also as old as the policy of the state, without tracing them through other Codes. Under section 140 and section 3965, it is provided that the officer shall seize books of account and other evidences of debt belonging to the defendant; the object of this is to get the names of the debtors; the levy on the books of account or the choses in action, the mere paper or parchment, does not bind the debt until the garnishments are served on the debtors. This has been more than once decided by our own courts, with these provisions in the Code. *Boon* v. *McIntosh,* 62 Miss. 744; *McKinney* v. *Sweet,* 28 So. 939. The learned court below failed to take notice of the substantial character of a judgment lien; the lien is not specific so as to hold liable for conversion any third person or the defendant through whose hand the property may pass, as our court has held. *Smith* v. *The Gin Co.,* 75 Miss. 505. Again, money is property, and subject to seisure under execution or attachment, but our court has held that no lien attaches to it until seisure thereof, because of its current character, the impossibility of identifying it, and because of public policy, and because such a doctrine

would put an unbearable embargo on the transaction of all business. *Cahn* v. *Pearson,* 56 Miss. 360.

In spite of the broad term property, used in our judgment lien statutes already quoted, the lien is confined to property liable to levy and sale; quoting from a decision of this court: "In this state, however, a judgment is only entitled to a priority of satisfaction over other debts, when it operates as a lien, or can be enforced by execution against the estate of the deceased; and this is more an advantage which the law gives to the creditor than duty required of the executor or administrator to pay the judgment in preference to other claims. The lien is confined to such property as is liable to levy and sale under execution. No right over other creditors exists to prior satisfaction out of the assets not liable to the execution." *Robertson* v. *Demoss,* 23 Miss. 298. Judgment liens do not and cannot bind choses in action. *Black* v. *McMurtry* (Miss.), Walker Rep. 389; 23 Cyc. 1367; 17 Am. & Eng. Ency. of Law, 788; Black on Judgments, secs. 417, 418, 419.

We submit that our Code provisions of nearly a century and our decisions thereunder make impossible the construction of the judgment lien statute made by the court below. The evil arising from such a construction in the transaction of ordinary business would be deplorable, which, when properly construed, makes it plain that the legislature never, for an instant, contemplated such literal narrowness when it used the word property in the judgment lien statute and in defining what property is, under the chapter on Definitions and Rules. In applying those terms, the nature of the property and the course of business must be kept in view, and it cannot be supposed that the legislature intended to do an absurd and foolish thing. But say counsel, the judgment lien statute says or makes the enrolled judgment a lien on all property and property is defined to include choses in action, and therefore the judgment is a lien on a chose

in action. But see the absurd results that would follow; before the debtor could take the money out of his pocket and pay the creditor, he would have to consult the judgment roll to see if there are any enrolled judgments against the creditor, and when he took up his note and had it marked cancelled, he would run the hazard of there being an enrolled judgment lien against it, which would make him pay it again. Transactions of this character are so numerous, and the means of identification of money and notes are so difficult that chaos would result if such a construction were to be given the statute. When a horse changes hands, which can be seised and of which the debtor can be dispossessed, or when lands change hands, it is of course incumbent upon the purchaser to consult the judgment roll, but this is as far as any code of civil procedure has ever undertaken to go. All the provisions of the Code must be read together.

McFarland & McFarland, for appellee.

The judgment of the court was entirely correct. From the date of enrollment plaintiff acquires a lien on all property belonging to his debtors, and binds all of defendant's property without regard to its character or description. 86 Miss. 354.

The court will note that under section 3466, Mississippi Code 1892, provision is made for the first time for levy of execution on choses in action, such property prior to that time not being subject to levy and sale under execution.

The only Mississippi case in which this point has come up for decision in the case of *Black* v. *McMurtry,* Walker Reports 389, where the court held that a judgment was not a lien on choses in action, because the only property bound by judgment was that which can be seised and sold under execution, which could not be done, at that time, as to a chose in action. As pointed out above, our Code

now provides that a chose in action can be seised and sold under execution, therefore it is bound by an enrolled judgment.

The statute on enrolled judgment says that all property of the defendants is bound by an enrolled judgment, but the court has declared, in numerous cases, that by all property is meant such property as is subject to seisure and sale under execution. See 23 Miss. 298; 75 Miss. 505.

So we contend that the lien of appellee's enrolled judgment extended to the money due by Monroe county to Dockery.

The court will observe that when the county filed its first answer as garnishee, it knew nothing of the so-called assignment of Dockery to appellants, and we submit that appellee was first in law, having taken steps to collect its judgment out of defendant's funds in another's hands, and that the judgment should be affirmed. These orders on the board of supervisors were not proper assignments, but even admitting that they were, they were only equitable assignments, to take effect after the money became due, which was after appellee had taken steps to subject same to his judgment. These orders are not drawn upon any particular fund, but generally upon anything that might be owing to Dockery.

Appellants knew of the enrolled judgment at the time these orders were given them, and the consideration of the orders was an old debt due by Dockery. Bryan had security for this debt and has never foreclosed his mortgage on same.

Counsel for appellants insist that if the court should hold that the enrolled judgment covered this property, that it would cover money, promissory notes, and things of that character. But of course it would not, if they stand in a class to themselves, as said in 56 Miss. 360. The law does not fix a lien to money or things so fugitive, which circulate as currency and are so impossible to iden-

tify; as to them the lien begins from the seisure. This property was certainly not of that class.

The court will find that all the cases, which decided that a chose in action is not bound by an enrolled judgment, are so decided because a chose in action is not subject to levy and sale under execution; but now that our statute provides for just this thing we submit that this case should be affirmed.

Paine & Paine, for appellee.

We deem it proper to accept the apology of counsel for appellant for their lengthy brief. We commend their zeal and assiduity; we pronounce the brief a perfect success in so far as it avoids a discussion of the law of this state. The supercilious way in which it ignores the case of *Minshew* v. *Davidson et al.*, 86 Miss. 354, is refreshing in its haughtiness and monumental in its indifference. By the way it recalls the seeming indifference of the antedeluvian who was adrift on the log, and after many days on the water, had, at length, floated up to the Ark in which Noah and his family were resting upon the bosom of the deep; this man is reported to have tapped on the window of the Ark for admission and on being refused, replied that he did not care because he was confident it was only going to be a Spring freshet.

To us it seems as though counsel have overlooked this case or are trying to have it overruled by sheer indirection. If this case of *Minshew* v. *Davidson et al.*, 86 Miss. 354, is the law of this state, as to what property is bound by an enrolled judgment, then we need no argument to sustain the judgment appealed from and the case should be affirmed.

The court will observe in the opinion by Judge TRULY, in the above case where he says: Upon enrollment, the lien of a judgment binds all the property of the defendant without regard to its character or description. Mr. Webster defines property as that to which a person has a

legal title whether in possession or not. Mr. Bouvier defines a chose in action as a right to receive or recover a debt or money for damages for breach of contract, etc.

The county was due Dockery the sum of one hundred and seventeen dollars and fifty cents and so answered when garnished. Then this indebtedness to Dockery was a property right to which Dockery had a legal title. But say the right is but a chose in action, then under Mr. Bouvier's definition of a chose in action, which he says is a right to receive or recover a debt or money, etc., the conclusion is to us inescapable that the judgment, when enrolled, constituted a lien upon this indebtedness.

Again section 819 of the Code of 1906, gives a lien, when enrolled, upon and to and binds all of the property of the defendant, etc. Again sections 1491 and 1593 of said Code, the one classifying personal property, the other describing it, justifies us in our assertion that the court committed no error in giving judgment for the appellee. We can't apprehend the argument of counsel as to the very literal construction they term it, that we place on the statutes of our state. Because we are sustained in our construction by Judge TRULY in the case of *Minshew* v. *Davidson et al.*, 86 Miss. 354, and the sections of the Code of 1905, to wit: 819 and 1591. If, however, we are subject to such a criticism, then we submit that we are in good company and are willing to be so classified.

REED, J., delivered the opinion of the court.

The trial court erred in holding that the enrolled judgment against J. J. Dockery and in favor of appellee was, under the statute (section 819, Code 1906) a lien against an indebtedness owing by Monroe county to Dockery, and that the amount of the indebtedness paid by the county into the court should be applied on the judgment in a proceedings on a writ of garnishment, issued subsequent to the giving by Dockery of orders on the county in favor of appellants and the due presentation thereof, rather

than to the payment of the orders. The lien of the statute does not extend to cover the right to receive or recover a debt.

Reversed, and judgment here for appellants.

Reversed.

S. E. McConnico v. State.

[65 South. 243.]

Criminal Law. *Banks. Receiving deposits. Criminal prosecution. Admissibility of evidence.*

It is not admissible in order to show the insolvency of the bank, in a prosecution of a bank cashier for receiving a deposit after he knew or had good reasons to believe the bank insolvent, to introduce the record of a judgment against the bank, from which an appeal has been taken and is still pending.

Appeal from the circuit court of Carroll county.

Hon. J. A. Teat, Judge.

S. E. McConnico, was convicted of receiving a deposit in a bank, of which he was cashier, when he knew, or had good reasons to believe, the bank insolvent, and appeals.

The facts are fully stated in the opinion of the court.

Monroe McClurg, S. E. Turner, J. W. Conger and *A. A. Armistead,* for appellant.

Noel, Boothe & Pepper, and *Frank Johnson,* assistant attorney-general, for the state.

Cook, J., delivered the opinion of the court.

Appellant was convicted for receiving a deposit in a bank of which he was cashier which he knew or had good reason to believe was insolvent at the time.

Numerous reasons for the reversal of this case are assigned and earnestly argued in the briefs of counsel for appellant, but as we see it the decision of one point will be determinative; it is unnecessary to consider anything but this single question.

The book assets of the bank are largely in excess of the liabilities; but evidence was introduced by the state tending to show that many of the items appearing on the books as assets were, in fact, incapable of being reduced to cash.

In order to establish the insolvency of the bank, the court permitted the state to introduce in evidence, over the objections of defendant, the record of a judgment rendered by the circuit court against the bank for nine thousand, three hundred and twenty-two dollars and twenty-five cents in favor of the Bank of Winona.

The record shows that, at the time the record of the judgment was introduced in evidence, the bank against which it had been rendered had perfected its appeal from said judgment, and the appeal was then pending in this court. The judgment having been appealed from, the record of same was not evidence tending to show that the claim on which it was based was in fact a liability of the bank of which appellant was cashier. The introduction of the judgment was error, and therefore the judgment of the lower court is reversed, and the cause remanded.

Reversed and remanded.

First Baptist Church of Oxford v. W. M. Hendricks et al.

[65 South. 244.]

1. Principal and Surety. *Liability of surety. Breach by principal. Action against surety. Evidence.*

Where a written contract was made providing that the principal should personally superintend the construction of a building at a *per diem* rate, with authority to contract for labor and materials, subject to the approval of the building committee and to push the work to completion, without employing any assistant, under which payment for wages were to be made to him weekly, and the principal gave a bond conditioned to well and truly perform and complete such contract and to indemnify the committee against the expenditure of more than $6900, and after the principal had superintended a large part of the work and purchased most of the material, he left and placed an employee in charge, who continued the work under his instructions by letter, and to this arrangement the building committee though knowing of it, did not consent, supposing the absence of the principal was temporary and continued to make its checks for wages payable to the principal and the building, when completed, exceeded the fixed cost, in such case the contract was breached and the sureties were liable on their bond.

2. Principal and Surety. *Action against surety. Evidence.*

In such case the exclusion of evidence as to expenditures while the principal was absent was error.

Appeal from the circuit court of Yalabusha county.

Hon. N. A. Taylor, Judge.

Suit by the First Baptist Church of Oxford, Mississippi, against W. M. Hendricks and others. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Creekmore & Stone, for appellant.

R. F. Kimmons and *J. C. McGowen,* for appellees.

REED, J., delivered the opinion of the court.

J. F. Leonard entered into a contract with the First Baptist Church of Oxford, Mississippi, to superintend the building of a Sunday school annex and making certain repairs and improvements on the church edifice. He was given authority to make contracts for labor and materials, subject to the approval of the building committee. He agreed to give his personal services as manager and superintendent and to push the work to a speedy conclusion, and for his services he was to be paid a stipulated amount per day. The contract, in addition to setting forth its terms, contains a statement of the negotiations between Mr. Leonard and the church leading up to the making of the agreement. Omitting the formal opening and closing paragraphs of the contract, we give it in full, as follows:

"Said Leonard having heretofore submitted to said committee a bid for the construction of a Sunday school annex and the making of certain repairs and improvements on the old church building, proposing to carry out the plans and specifications of H. J. Harker, architect, with certain enumerated exceptions therein specified, for the aggregate sum of six thousand, nine hundred dollars (said bid not including the heating plant), which bid, signed by the said Leonard, is hereto attached; and the said Leonard having further proposed as an alternate proposition: If the committee would employ him as manager and superintendent, allowing him to purchase materials and contract for the labor, allowing him five dollars and fifty cents for each working day, as compensation for his service as such manager and superintendent, that he, the said Leonard, could save money for the committee, even on his own bid, in furtherance of which last proposition the said Leonard now agrees to warrant and guarantee to said committee that the entire cost of said construction, improvements, and repairs (as above described),

together with all incidental expenses and every other item of monetary expenditure, shall not exceed the aggregate sum of six thousand, nine hundred dollars; the said Leonard agreeing that, if said total cost should exceed said sum of six thousand, nine hundred dollars, then and in that event he will pay the excess necessary to complete the work; the said Leonard agreeing further to execute and furnish a good and satisfactory bond acceptable to said committee, in the penalty of one thousand, eight hundred dollars, conditioned on the faithful and competent performance of this contract of management and superintendence, and on making said committee whole against the expenditure of more than said six thousand, nine hundred dollars, in the completion of the work specified:

"Now, therefore, said building committee having considered both said propositions fully, does here and now accept the last-named proposition on the terms mentioned above, and agrees to pay the said Leonard the sum of five dollars and fifty cents per day for each working day from this date for his services as such manager and superintendent, until the work is completed, giving the said Leonard authority to make contracts for labor and materials, subject only to the approval of the building committee. The said Leonard agrees to begin the work at once and to push same to a speedy conclusion, devoting his entire time and attention solely to this work, until finished, and completing the same as quickly as is consistent with good workmanship and safe construction. No other person is to be employed by the said Leonard as assistant foreman or superintendent, but the said Leonard is to do all such work himself.

"Said committee agrees to pay the necessary expenses of the said Leonard when away from Oxford for the sole purpose of getting labor or materials for this work, such as car fare, hotel bills, telegraph and tele-

phone bills, necessarily incidental to the work; said incidental expenses estimated by the said Leonard not to exceed the sum of thirty dollars.

"The committee reserves the right to make any changes it may see fit in the plans and specifications of the said H. J. Harker, which are hereto attached and made a part of this contract.

"Payments for wages are to be made once each week; all payments for any purpose are to be made by check."

Pursuant to the provision in the contract that he would furnish a bond in the sum of one thousand, eight hundred dollars, conditioned on the faithful and competent performance of the contract, of management and superintendence, and on the making the building committee of the church whole against the expenditure of more than six thousand, nine hundred dollars in the completion of the work specified, Mr. Leonard, as principal, executed a bond, with appellees herein as sureties, in the sum named and payable to the building committee. We quote in full the condition in the bond:

"The condition of the above bond is this: Whereas, the said Leonard has entered into a contract in writing with the said building committee to superintend the construction of a Sunday school annex, and to make certain repairs on the present church building, to purchase all material, and employ and procure all labor for the same, copy of which contract is hereto attached: Now, if the said Leonard shall well and truly perform, carry out complete, his said contract according to its terms, and indemnify said church against the expenditure of more than the sum of six thousand, nine hundred dollars in the accomplishment of the work provided for in said contract and the plans and specifications therein mentioned, then this obligation to be void; otherwise, to remain in full force and effect."

Mr. Leonard thereafter, in accordance with the contract, began the work. He continued as superintendent

in personal and actual charge of the construction until a large part thereof had been done. He then left Oxford, and placed C. C. Gunter, who had been in his employ and assisting in the building, in charge of the work, which was thereafter continued under directions from Leonard, but under the immediate supervision of Gunter. Gunter received instructions and orders from day to day by letter from Leonard. Members of the building committee knew of Leonard's absence from the work, and knew that Mr. Gunter had immediate supervision thereof; but appellants did not consent to his absence, which was supposed to be temporary, nor consent to his failure to give his personal supervision.

Nearly all of the material for the building had been purchased by Leonard before he left Oxford. Mr. Gunter purchased less than one hundred dollars worth of material. A considerable sum was expended after Leonard left in the payment of wages to men who had been previously employed by him at fixed amounts for their services. Appellant continued to give checks for the weekly pay roll after Leonard left Oxford, and these checks were made payable to him. When the building was finally completed, it was ascertained that the total cost amounted to eight thousand, eight hundred and twenty-five dollars and ninety-eight cents, or one thousand, nine hundred and twenty-five dollars and ninety-eight cents more than the amount of the cost guaranteed by Leonard in his contract. Suit was brought on the bond for the full penalty thereof.

During the trial, the court excluded the testimony of all items of expenditures after Leonard ceased to be physically present superintending the work. When all of appellant's testimony had been introduced, the court excluded it, and directed a verdict for appellees, from which action this appeal is prosecuted.

It is contended by appellees that they are relieved of liability in this case, because their principal, Leonard,

did not give his immediate personal supervision of the work, as provided in the contract. They claim that there was a breach of the stipulation in the contract which reads, "No other person is to be employed by the said Leonard as assistant foreman or superintendent, but the said Leonard is to do all such work himself;" that there was such departure from the terms of the contract as to release the conditions of the bond. This contention was sustained by the trial court, who evidently interpreted the provision in the contract just quoted as being for the benefit of the sureties, and that a failure to comply therewith relieved them in full.

We cannot agree with this construction. The bond was given to protect the church against any loss by reason of the failure of the principal, Mr. Leonard, in performing and completing his contract. It was given to guarantee his accomplishing the work as therein provided. He obligated himself to personally supervise, give his entire time, and complete the work as quickly as was consistent with good workmanship and safe construction, and make whole the committee for expenditures exceeding six thousand, nine hundred dollars in completing the work. He failed to complete the church for the sum named, and failed to "well and truly perform, carry out complete," his said contract, for he continued in charge of the work until its completion, though he was not physically present during all of the time, and for a time was acting through an agent under his daily instruction. The church did not agree to Leonard's physical absence from the work, and did not thereupon make a new contract with him, whereby he was authorized to delegate the superintendency to another person. All of the work was done under the same contract. The church did not breach the contract, but Leonard, the principal, did, and the sureties on his bond should be held liable for their principal's default.

The trial court erred in excluding the testimony of the expenditures while Mr. Leonard was absent from Ox-

ford and not physically present superintending the work, and also in giving the peremptory instruction for appellees.

Reversed and remanded.

WALLACE DEANES *v.* N. W. WHITFIELD *et al.*

[65 South. 246.]

1. EXECUTORS AND ADMINISTRATORS. *Acquisition of title by executors. Tax title. Life estate. Improvements. Right to compensation.*
The executor of an estate who has not been discharged has such a fiduciary relation to a life tenant and her interest in the land devised as prevents him from acquiring a tax title thereto, so as to defeat her title of that of the remainderman.

2. LIFE ESTATES. *Improvements. Right to compensation. Code* 1906, *section* 1848.
The tenant of a life estate, making permanent and valuable improvements, has no claim upon the remainderman for reimbursement.

3. SAME.
Code 1906, section 1848, allowing compensation for improvements put upon land, applies only where the party making the improvements is liable to account for rents.

4. LIFE ESTATE. *Sales. Rights of purchaser. Improvements.*
One who purchases land from the tenant for life, who held under a will of record in the county in which the land was situated at that time, was chargeable with notice that he purchased from a life tenant and could not recover from the remainderman for improvements placed on the land, although before his purchase the land had been included in a new county and there was no record of the will in such new county.

Appeal from the chancery court of Clay county.

HON. J. Q. ROBIBS, Chancellor.

Suit between Wallace Deanes and N. W. Whitfield. From a judgment for Whitfield, Deanes appeals.

The facts are fully stated in the opinion of the court.

A. F. Fox, for appellant.

J. J. McClellan and *Wm. Baldwin,* for appellees.

REED, J., delivered the opinion of the court.

This action concerns the title to certain lands, which were devised in the will of William Whitfield, who died in 1854, to his daughter, Lucy A. Whitfield, for her life, and, if she died childless, to her brothers, John A. Whitfield and William W. Whitfield, to be held by them during the terms of their life, and at the death of either to the survivor, and at the death of both to their children in fee. John A. Whitfield was killed during the Civil War and left no children. Lucy A. Whitfield died childless in 1887. Upon the death of his sister Lucy, William W. Whitfield became the owner of the life estate in the land. He died in 1901, and appellees, his children, then became the owners of the land in fee, and shortly thereafter filed their bill in chancery to recover their property.

Appellant claims title to the land through a deed of trust given by William W. Whitfield and Lucy A. Whitfield, April 26, 1875, and deed from the trustee therein, January 1, 1877. He also claims under a tax deed to S. E. Whitfield, the wife of William W. Whitfield, dated January 1, 1877, and deed from William W. Whitfield and his wife, S. E. Whitfield, to him dated March 28, 1877. The facts in this case are practically the same as those in the case of *Whitfield* v. *Miles,* 101 Miss. 734, 58 So. 8, and as they are fully set out in the opinion in that case, we make special reference thereto now for a more complete statement of the same.

William Whitfield's will appointed William W. Whitfield and his brother, John A. Whitfield, executors thereof, and they qualified and gave bond; and they were also by the will charged with certain duties and management of their sister's property. It was decided in the case of *Whitfield* v. *Miles* that, under the terms

of the will, there was a life estate in this land vested in the daughter, and there was a vested right in the remainderman, which the trustees could not defeat, and which the surviving brother could not convey beyond a life interest therein. It was also decided that W. W. Whitfield sustained such fiduciary relations to appellees as to prevent him from acquiring a tax title to the land in controversy and set it up against them, and that as he could not assert such title against his remaindermen the same disability attached to his wife, Mrs. S. E. Whitfield. Her purchase of the tax title operated as a redemption of the land for the interest of the life tenant and remaindermen.

Counsel for appellant asks for a reconsideration of the decision in the case of *Whitfield* v. *Miles,* claiming that it was founded upon a misconception of the facts presented. He claims that it is shown in the evidence that when, in 1877, the tax title was acquired, Lucy A. Whitfield had no property and no business, because she had sold certain land she owned, and other land she owned had been sold under a trustee's deed and a sheriff's deed. We think counsel is wrong in this contention, for Miss Whitfield owned an interest in the land in this controversy, and she therefore had property, and had business in connection therewith, which required the attention of her agent and trustee, William W. Whitfield. His fiduciary relations with his sister had not been terminated. He had not been discharged as executor, but bore such relation to her and had such interest in the land as precluded him from acquiring a tax title thereto, so as to defeat the title of his sister and of the remaindermen, the appellees herein. We approve the decision in the case of *Whitfield* v. *Miles,* and find that the chancellor in the case at bar, in decreeing the title to the land in this controversy to be in appellees, followed that decision and was not in error.

Appellant asserts that the chancellor erred in not allowing for permanent and valuable improvements put

upon the land before the death of William W. Whitfield, and while he (appellant) only owned the life estate therein. Counsel for appellant, in his brief, contends that:

"All that is required to entitle one to compensation for improvements in a case like this is that he must claim the land under color of title in the honest belief that he is the true owner, and he must act in perfect good faith and not be guilty of negligence in investigating the title."

It seems to be the settled law in this state that compensation for improvements is applicable only where there can be a demand for mesne profits, and that improvements put upon land by the life tenant pass to the remainderman, and that, as the life tenant is not liable for rents, he is not entitled to compensation for improvements made during the existence of his estate. *Pass* v. *McLendon,* 62 Miss. 580. Judge Cooper, delivering the opinion of the court in that case says:

"Section 2512 of the Code of 1880, allowing to the defendant in ejectment compensation for improvements put upon the land sued for, is applicable only where the plaintiff demands, or might demand, mesne profits in the action. The improvements put upon the lands by the defendant during the life of the life tenant passed to the remaindermen by the expiration of the particular estate, not by a failure of the title under which the defendant held. He was under no liability to account to the plaintiffs for rents during the continuance of the life estate, and, because he was not, he cannot be allowed for improvements then made."

The provisions in section 2512 of the Code of 1880, on the subject referred to, are now substantially in section 1848 of the Code of 1906.

In *Wilson* v. *Parker,* 14 So. 264, Judge WOODS, delivering the opinion of the court, in which it was decided that the tenant of the life estate, who has made perma-

nent and valuable improvements, has no claim on the remaindermen for reimbursement, said:

"The tenant of a life estate, making permanent and valuable improvements, can have no claim upon the remaindermen for reimbursement. The improvements were made upon his own estate, for its better enjoyment by him, and presumably with full knowledge of the right in the remaindermen to the entire estate, with all its improvements, upon the termination of the life estate. The life tenant, in making improvements, does not expend his money for another's use and advantage, but for his own. It would be as plausible to insist upon the payment of rents by the life tenant when he demands the value of the improvements he has made upon the property."

Counsel, in order to excuse appellant from being "guilty of negligence in investigating the title," claims that there was never any record of the will in which the land was devised in Clay county, where the lands were situated when purchased by appellant. It appears that when the will was probated the lands were in Lowndes county, and that the will is of record in that county; that thereafter the lands were included in the territory taken from Lowndes and given to the present county of Clay upon its organization. He relies upon the holding of the court in the case of *Cole* v. *Johnson,* 53 Miss. 94, wherein it was decided that a defendant in ejectment could claim for improvements where he had purchased land at the sale under a decree of the probate court, and paid for the same, believing his title to be perfect. In the case of *Stewart* v. *Matheny,* 66 Miss. 21, 5 So. 387, 14 Am. St. Rep. 538, both *Pass.* v. *McLendon* and *Cole* v. *Johnson* were approved. Judge CAMPBELL, delivering the opinion of the court, thus refers to the holding in *Cole* v. *Johnson*s

"One might well be excused from the requirement of forming a correct opinion as to the validity of a sale of land under a decree of the probate court under the view

taken of that court by the appellate court, and was not chargeable with bad faith, or gross negligence (its equivalent) for believing, until informed to the contrary, that a sale made by a decree of the court intrusted with jurisdiction over the subject and parties was regular and conferred title."

We quote further from Judge CAMPBELL'S opinion in *Stewart* v. *Mathenys*:

"In *Pass* v. *McLendon*, 62 Miss. 580, one who had purchased land from a tenant for life, who held under a will of record in the county in which the land lay, in ignorance of the fact that his vendor did not have the fee, and believing that he acquired the fee, was not entitled to pay for improvements made by him during the existence of the life estate."

Continuing his opinion, the eminent judge says:

"But the purchaser of land must be conclusively presumed to know what appears on the face of the title papers under which he claims, and this presumption cannot be rebutted or explained away. He must take notice of his title as being to a life estate or a fee where that title is plainly disclosed by the records accessible to him, and not to examine which, ordinarily, would be gross negligence."

The difference in the two cases will be seen. The case at bar is like that in *Pass* v. *McLendon*.

We do not think that appellant was relieved of his duty under the law to examine the records touching the title to the lands he purchased, because all of the records were not in Clay county. Ordinary prudence and caution would require him to extend his examinations back of the records in Clay county into those of Lowndes county, where the land was originally located. Any reasonable examination would have disclosed to him that the title to this land came through the will of William Whitfield, and that under that will the parties through whom he received title had only life estates.

Affirmed.

S. M. WELD & Co. v. AUSTIN.

[65 South. 247.]

1. GAMING. *Gambling contracts. Dealing in futures. Recovery of payments. Pleading. Necessity of pleading set-off. Code* 1906, *section* 2303.

Under Code section 2303, so providing, contracts for the purchase or sale of commodities for future delivery, the parties not intending an actual delivery, or contracts of the kind commonly called "futures" are not enforceable, and when plaintiff represents defendant in buying and selling cotton for future delivery, and extended him a credit margin and some of the transactions were closed at a profit and others at a loss, payments being made of the differences in price arising out of the rise and fall of the market price above or below the contract price and the facts showed that no actual delivery of the cotton was contemplated, and that the contract was of the kind commonly called "futures" such a contract is condemned by the statute and will not be enforced in the courts.

2. GAMING. *Gambling contracts. Recovery of payments.*

Under Code 1906, providing that any person making any contract of the kind commonly called "futures" and who by reason thereof shall lose any money and pay or deliver it, may recover such money from the person "knowingly" receiving it, the knowledge of a cotton broker's agent through whom negotiation and dealings in future were had, was the knowledge of the broker.

3. PLEADING. *Set-off. Necessity of pleading.*

Where in a suit on a contract, defendant plead that the contract was one of the kind commonly called "futures," and claimed a set-off for money paid thereunder, and the replication simply denied the indebtedness, and made no reference or claim to money paid under the contract by plaintiff to defendant and plaintiff filed no pleading in the nature of a set-off or counterclaim, the amount paid under the contract by plaintiff to defendant could not be credited on the amount of defendant's counterclaim.

APPEAL from the circuit court of Panola county.
HON. N. A. TAYLOR, Judge.

Suit by S. M. Weld & Co. against J. C. Austin. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Henry Craft, and *L. F. Rainwater,* for appellants.

Shands & Montgomery, for appellee.

REED, J., delivered the opinion of the court.

This is a suit brought by appellants, Stephen M. Weld & Co., a firm doing business in the city of New York, against appellee, I. C. Austin, doing business in Panola county, Mississippi, under the firm name of Austin & Co., to recover the sum of one thousand and fifty dollars balance due upon an account for money advanced and loaned by appellants to appellee in the purchase and sale by him of cotton for future delivery.

Appellee filed three pleas to the declaration: (1) The general issue; (2) claiming that the amount sued for was for losses of appellee "on contracts commonly called 'futures,' " and void under the provisions of section 2203 of the Mississippi Code of 1906; and (3) claiming a set-off or counterclaim in the sum of seven hundred and fifty dollars, being the amount lost by appellee and paid to appellants "on contracts commonly called 'futures' and on contracts for the purchase and sale of cotton," which cotton was not intended to be actually delivered in kind and the price paid therefor.

To the second and third pleas appellants filed replications, denying that the losses were on contracts commonly called "futures," and denying any indebtedness to appellee. At the end of the introduction of testimony for both sides the court granted an instruction directing the jury to find for appellee in the sum of seven hundred and fifty dollars.

It is contended by appellants that the facts in this case do not show a violation of the law of this state (section

2303 of the Code of 1906); that the understanding and dealings between appellants and appellee as set forth in the evidence do not establish a contract of the kind commonly called "futures," or a contract for the purchase or sale of a commodity to be delivered at a future date, the parties not intending it to be actually delivered.

Mr. Austin, appellee, made arrangements with George W. Fooshe, who was the agent for Weld & Co. at Memphis, Tennessee, for the handling of the cotton contracts involved in this suit. Mr. Austin was engaged in the business of buying and selling spot cotton in the town of Como, in Panola county, Mississippi. He was solicited by Mr. Fooshe to enter into an agreement whereby Mr. Fooshe would represent him in buying and selling cotton for future delivery, and extend him a credit margin in the transaction. The understanding and agreement between the parties is disclosed by the correspondence. It is shown in the correspondence, made exhibits to the testimony of witnesses, that Mr. Fooshe from time to time reported to Mr. Austin the situation of the cotton futures market, and also that there were transactions between them, whereby deals in future contracts were closed, some at a profit, and more at loss to Mr. Austin. The total amount of seven hundred and fifty dollars was paid by Mr. Austin, through Mr. Fooshe, to Weld & Co. by reason of his losses in these transactions.

From all of the evidence of this case, considered together, it appears that Mr. Austin and Mr. Fooshe, the agent acting for Weld & Co., did not intend, in the deals of the purchasing and selling for future delivery, the actual delivery of the cotton, in kind and the full price therefor paid. The contracts between them fall under the definition of "the kind commonly called 'futures.'" The testimony shows that payments made under the contracts were the payments of "differences in prices arising out of the rise and fall of the market price above or below the contract price." Such contracts are con-

demned by the statute to be not enforced by any court. *Ascher & Baxter* v. *Moyse & Co.*, 101 Miss. 36, 57 So. 299.

These contracts are not relieved of their invalidity through appellants sending to appellee a memorandum of the transaction had with Mr. Fooshe, their agent, containing the following:

"Please take notice that all orders for the purchase and sale of cotton for future delivery are received and executed with the distinct understanding that actual delivery is contemplated and the party giving the order so understands and agrees."

The name of the party to whom he was to make delivery where the future contract of sale was closed, or from whom he was to receive the cotton in the case of a purchase, is not given in the several copies of the memorandum in the record. There was also this additional provision in the memorandum:

"It is further understood that on all marginal business the right is reserved to close transactions without notice when margins are near exhaustion."

The business dealings between the parties to this suit were terminated by the closing of two transactions of purchase and sale of future cotton without the direction of appellee, because his margins were exhausted.

The court did not err in directing the jury to find for appellee in the sum of seven hundred and fifty dollars. The offset or counterclaim was properly and duly presented in appellee's second plea, to which replication was filed and issue was joined. Appellee was entitled to recover under the statute (section 2303 of the Code of 1906) providing that any person who makes a future contract, and shall lose or pay any money by reason thereof, may sue for and recover such money from the person knowingly receiving the same. The knowledge of Mr. Fooshe, the agent, and through whom all negotiations and dealings were had, was the knowledge of his principal, Weld & Co.

It is contended that, if appellants were liable for the seven hundred and fifty dollars claimed in the offset, then under their replication to the plea they should have been credited with the amount of three hunudred and sixty dollars, which had been paid appellee. The replication simply denies the indebtedness of seven hundred and fifty dollars, and makes no reference or claim to the three hundred and sixty dollars. Appellants failed to file any pleading in the nature of a set-off or counterclaim for the amount. Therefore no judgment therefor could be entered in their favor.

Affirmed.

McAlister Bros. & Co. v. Sanders.

[65 South. 249.]

Interpleader. *Effect. Code* 1906, *section* 772.

The interpleader provided for in Code 1906, section 772, is merely a substitute for the original interpleader in equity, which could not be sustained unless the interpleader was a naked trustee of the property for which there were two or more claimants, to either of whom he was willing to deliver it, and hence a defendant, who filed a bill of interpleader, cannot, when the party interpleaded did not appear and set up his claim, complain that the court awarded judgment for plaintiff, for the filing of the interpleader admitted defendant's liability.

Appeal from the circuit court of Tippah county.

Hon. H. K. Mahon, Judge.

Suit by J. B. Sanders against McAlister Bros. & Co. From a judgment for plaintiff, defendant appeals.

This case is before the court for the second time, the first decision being reported in 101 Miss. 227, 57 So. 801. On the former hearing the case was remanded, and thereupon appellants, who were defendants in the lower court,

filed an affidavit, as authorized by section 772, which set up the fact that the Tishomingo Savings Institution had a claim to the subject-matter of this action (the note sued on), and prayed that said institution be summoned and an issue of interpleader be made up. At the same time the defendants filed a motion to be allowed further time to plead to plaintiff's declaration. This motion was continued, and process was duly issued to the Tishomingo Savings Institution to appear and assert whatever claim it had to the note in suit. At the succeeding term of the court, the Tishomingo Savings Institution failed to appear and maintain its claim, whereupon, on suggestion of the appellee, the court entered an order barring said institution from all claim to said note. The court then heard appellants' motion for further time to plead to the declaration, and overruled same on the ground that appellants, "by availing themselves of the privilege of interpleader as provided in section 772, waived and relinquished all claim in and to the subject-matter of said suit, and they are now estopped from further defending said action."

Appellants then filed a motion, in the form of an affidavit, in which they sought to be allowed to plead further; said affidavit alleging that the Tishomingo Savings Institution and the appellee had colluded together, with the purpose of defrauding appellants, and for this reason said institution had not appeared and maintained its claim. This motion was also overruled, and judgment final was entered against appellants for the amount of the note sued on. On the following day appellants moved the court for an order allowing them to withdraw their motion for an interpleader, which motion was also overruled.

Section 772 of the Code of 1906 is as follows:

772 (714). Proceedings When Third Person Claims Subject of Action. Upon affidavit of a defendant before plea filed in any action upon contract, or for the recovery

of personal property, that a third party, without collusion with him, has a claim to the subject of the action, and that he is ready to pay or dispose of the same, as the court may direct, the court may make an order for the safe-keeping or payment, or deposit in court, or delivery of the subject matter of the action to such person as it may direct, and an order requiring such third party to be summoned to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being duly summoned, or in case he be a nonresident of or absent from this state, if publication of summons shall have been made for him as prescribed by law for nonresident or absent defendants in chancery, shall fail to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein; but if such third party appear, he shall be allowed to make himself defendant in the action at law, instead of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit, or delivery thereof. If the claim of such third party extend to only a part of the subject-matter of the action, similar proceedings may be had respecting the part so claimed, and the action shall proceed as to the residue in other cases.

Leroy Kennedy, for appellants.

The mind of the court was not given to a consideration of any phase of the case, except that appellants by asking for an interpleader, put themselves in the position of being mere "stakeholders." This proposition is correct, ordinarily, but certainly not correct, nor applicable to cases tainted (as here) with fraud. The law is supposed to afford redress for every wrong—is this an exception to the rule? And is the party, interpleaded in this case, given full control of the case and allowed to dispose of the same as he wishes? When a third person

claims an interest in the subject of the action, it is only necessary under the statute to offer to pay, or dispose of the same as the court may direct, etc. This does not necessarily mean that the judgment of the court will go against the defendants, regardless of right and justice, and regardless of the law and proof which in all cases ought to determine the rights of the parties, as well as control the mind of the court in determining and finally disposing of the case. A judgment against defendant, and in favor of the party impleaded, would necessarily mean that defendants were bound to pay said judgment regardless of such equities. In such case defendants might hold legal off-sets or re-coup against the judgment so recovered by the interpleader or it might be that the proof would disclose a state of facts that would not warrant a recovery by either of the parties. In fact, it came to the notice of defendants, that the title to the note sued on was not in either of the parties claiming it, that it had been materially changed and altered by plaintiff and was therefore not susceptible of legal enforcement, etc., and they, therefore, offered to plead these things, so much in answer to the position taken by appellees that it was immaterial to us who recovered the judgment, since we were "stakeholders" and had no say as to what judgment was entered, or for whom. Neither does the doctrine of estoppel apply to appellants here. To do so would be to deprive them of vested legal rights. The record is saturated with fraud and collusion and appellants should have been allowed to plead and show the fraud. We have no fear of the final outcome of the trial of this case on the merits. Appellee will then go out of court whipped of justice, and wearing upon his face the seal of condemnation, as fixed by the verdict of twelve honest jurors against him.

Thomas E. Pegram, for appellee.

The right of a defendant, when sued, to have a third party interplead and to propound a claim to the sub-

ject-matter in action was unknown to the common law courts, but it was an equitable remedy. Section 772 of the Code of 1906, has the effect of establishing interpleader in our courts of law. "The code provision is a substitute for the original bill in equity and is governed by the same principals." 23 Cyc. 36 and footnote.

The complainant, in a bill in equity for an interpleader, is in the same attitude as an original defendant in a suit at law who has made the affidavit as required by said section 772. Therefore, the principles of law applicable to the one are applicable to the other. "On a bill of interpleader the complainant cannot be heard as to his liability, since it assumes that he is merely a stakeholder and stands impartial between the claimants." "A bill of interpleader necessarily admits the indebtedness of the complainant, and if one of two parties defendant with draws all claim to the fund a decree that it be paid to the other is a matter of course." "Where one of the defendants fails to interplead or is defaulted, the other, if he has answered, is entitled to the fund deposited in court and the complainant has no right to dispute his claim." These quotations are taken from page 30 of 23 Cyc. For the purpose of showing clearly the attitude of appellants, let us suppose that section 772 had not been made a part of our statutory law, in which event appellants would have, instead of making the affidavit required by said section, filed the bill in equity, tendering the money into court, and asking that the Tishomingo Institution and J. B. Sanders be made parties defendant thereto, and praying the court to decree which of said defendants were entitled to the fund and to absolve complainants (appellants) from all further liability on account of the note. And let us suppose that Sanders answered the bill of complaint, claiming the money, and the Tishomingo Savings Institution failed to answer. Under this state of the case it could not certainly be contended, with any degree of good faith, that the com-

plainants in the bill could then assert that they did not owe the debt and have the court of equity to determine whether they did owe the debt. This peculiar procedure is exactly what appellants wanted to do in the lower court. They filed their affidavit saying that they were "ready to pay offi and satisfy said note," caused the court to issue the writ to the Tishomingo Savings Institution, and caused the case to be continued to the next term for the purpose of determining whether the fund belonged to the Tishomingo Savings Institution or to Sanders, and when the said institution failed to appear, they appeared in court, set up their claim to the fund and ask that their liability be litigated. It would be the worst of folly to allow a defendant under section 772 to ask for an interpleader on an affidavit that he is ready to pay the money into court, by this very affidavit disclaiming any interest in the fund, and then allow that same defendant, when the third party has failed to appear, to come in and say that he falsified in his affidavit and that he now desires to back track and claim the fund for himself. I submit that the process and functions of our august tribunals are not to be trifled with in any such manner. Defendants who avail themselves of the protection afforded by section 772 of the Code of 1906, by the very act itself disclaim any interest in the fund and set themselves before the court as mere stakeholders. *Browning* v. *Watkins,* 10 S. & M. 482; *Hyman* v. *Cameron,* 46 Miss. 725; *Snodgrass* v. *Butler,* 54 Miss. 45; *Whitney* v. *Cowan,* 55 Miss. 626. Thus it will be seen that, when the trial court declined to permit appellants to plead to the declaration after having made their affidavit asking for an interpleader, it followed the law as the same is unquestionably settled by the decisions of our own court.

SMITH, C. J., delivered the opinion of the court.

The interpleader provided for in section 772 of the Code of 1906 is merely a substitute for an original bill of

interpleader in equity and is governed by the same rules, one of which is that:

"In order to sustain a bill of interpleader, the complainant must be a naked trustee of property for which there are two or more claimants, to either of whom he is ready to deliver it; but, unwilling to decide which is rightful owner, he devolves the decision on the court." *Snodgrass* v. *Butler,* 54 Miss. 45.

When appellants invoked the provisions of this section, they thereby admitted liability on the note, and that the money sought to be recovered was due either to appellee or to the Tishomingo Savings Institution, and agreed to pay it to which ever of these parties the court should direct. That the Tishomingo Savings Institution failed to appear and propound a claim to the money was of no concern to appellants, and therefore the court committed no error in declining to permit appellants to plead further, and in directing them to pay the money over to appellee.

Affirmed.

J. M. BOWLES *v.* BRAVARD-WOODS STAVE CO.

[65 South. 273.]

JUSTICE OF THE PEACE. *Appeal. Dismissal. Justice's failure to approve bond.*

Where an appeal bond from a judgment of a justice of the peace was filed within the time required by law, and the justice stated that the bond was satisfactory, but failed to write his approval thereon and delivered the bond with the other papers in the case to the circuit clerk, it was reversible error to dismiss the appeal, because of the failure of the justice to write his approval on the bond.

APPEAL from the circuit court of Chickasaw county.

HON. H. K. MAHON, Judge.

Suit by the Bowles against the Brevard-Wood Stave Company. From a judgment of the circuit court dismissing the appeal, J. M. Bowles appeals.

The facts are fully stated in the opinion of the court.

J. E. Harrington, for appellant.

The weight of the testimony shows that the bond was presented in time but it seems that the court sustained the motion on the ground that the testimony of the justice of the peace was conflicting. But it seems clear from the evidence, as a whole, that the bond was presented to the justice of the peace within five days. If the testimony shows anything, it shows this, at least, by the weight of the testimony; in fact, to my mind, it shows this conclusively. If the bond was presented to the justice of the peace and approved by him, even though it was never filed, or marked "approved," still the appeal was perfected, and the motion should have been overruled. *Winner* v. *Williams,* 82 Miss. 669, 35 So. 308; *Redus* v. *Gamble,* 85 Miss. 165, 37 So. 1010.

R. H. Knox, for appelleee.

The court below very properly sustained the motion of appellee's to dismiss appellant's appeal to the circuit court, because the same, as is shown by the record in this case, was not appealed until after the statutory time for such appeals had expired. The case therefore, in our judgment, should be affirmed.

REED, J., delievered the opinion of the court.

This case originated in the court of a justice of the peace. In the circuit court a motion to dismiss the appeal was sustained because the appeal bond was not filed and approved within five days after the rendition of the judgment. The appeal bond was delivered by the justice of the peace to the circuit clerk, and is in this record; but there is no entry thereon showing its approval.

Appellant testified, on the hearing of the motion, that the judgment against him was rendered on a Saturday, and that on the following Tuesday he made and delivered the appeal bond to the justice of the peace, who accepted it and said it was all right. The justice of the peace testified that the bond was filed with him within less than five days after the rendition of the judgment, that he neglected to mark it "Approved," which was probably from an oversight, and that he would have approved the bond, and was still willing to approve it, and make proper entry thereon. He further testified that it was his custom to transcribe his record and file it with the circuit clerk as soon as bond for appeal was given, and that because of this custom it was his recollection that in the present case this was done. The circuit clerk was introduced, and we quote from his testimony as follows:

"Q. Tell the court when you filed that paper, with reference to the time Mr. Chennault handed it to you for filing, if you know? A. Why, I filed it the day he turned these papers over to me, August 10, 1909. When does it show that the judgment here was given in the lower court? A. The 6th day of August, 1909."

August 6, 1909, fell on Saturday, and August 10, 1909, on Wednesday. It was sufficient if the bond was approved on August 10th. From the examination of the witnesses in this case it seems that counsel expected the circuit clerk's testimony to show that the appeal papers were not filed in his office until after the expiration of five days.

The facts appearing in the record convince us that the trial court erred in sustaining the motion to dismiss the appeal. The failure on the part of the justice of the peace to indorse his approval on the appeal bond within five days after the rendition of judgment will not affect the validity of the appeal in this case, as it is shown that the bond was filed with him within the statutory time

and delivered by him, with other appeal papers, to the circuit clerk; that he made no objection thereto, nor to the surties thereon; that he was willing to approve it; and that he failed to enter his approal on the bond through mere oversight on his part. *Winner* v. *Williams,* 82 Miss. 669, 35 So. 308.

Reversed and remanded.

H. P. PACE *v.* W. M. PACE *et al.*

[65 South. 273.]

1. ESTOPPEL. *Estoppel in pais. Prejudice. Gifts. Delivery. Notes. Bank books. Gifts causa mortis. Necessity of delivery.*
Where a testatrix before her death made a valid gift *causa mortis* of certain notes, the donee is not estopped to claim them because of delivering them to the executor, making no claim to them and consenting to the probate of the will, no one being thereby misled to his prejudice or caused to give up anything.

2. GIFTS. *Delivery. Notes.*
The delivery of notes payable by the donor to the donee perfects a gift thereof to the donee.

3. GIFTS. *Delivery. Bank books.*
A delivery of the donor's bank book is not sufficient to perfect a gift *causa mortis* of his funds in the bank, since to perfect such a gift, there must be a legal delivery of the thing given.

APPEAL from the chancery court of Monroe county.

HON. J. Q. ROBINS, Chancellor.

Suit by H. P. Pace against W. M. Pace and others. From a decree dismissing the bill, complainant appeals.

The facts are fully stated in the opinion of the court.

Leftwitch & Tubb, for appellant.

We will briefly treat the instrument as a deed of gift, *inter vivos,* and, in so doing, we must not be held to

waive the argument heretofore made that the instrument is a valid conveyance, for a valuable consideration and definite end. In his evidence, appellant himself speaks of it as a deed of gift in one place, but however he may have defined it, this court should treat it as it is; but as a deed of gift, it is certainly a valid conveyance for that part of the estate of Mrs. Peavy which was delivered to appellant in her lifetime, actually or symbolically. We recognize that to make a deed of gift effectual, either as a gift *inter vivos* or *causa mortis*, there must be a delivery. *Thompson* v. *Thompson*, 2 Howard, 737; *Wheatley v. Abbett*, 32 Miss. 343; *Conner* v. *Hull*, 36 Miss. 424; *Young* v. *Power*, 41 Miss. 197; 14 Am. & Eng. Ency. of Law (2 Ed.), 1014-15. Was there a delivery? The learned chancellor evidently committed two errors; the first was in construing the paper as a deed of gift, and not a conveyance for a valuable consideration; and the second, in holding that there was no delivery of any of the property. He must have fallen into both of these errors to have dismissed plaintiff's petition outright. As to the two Billups notes, they were twice delivered; she first gave them to him on the morning of the 15th of November after she had sent for him the night before when she was very ill, all of which has its significance, along with the pass book. The testimony of appellant can be ignored, and this delivery is still indisputably shown and is by no one contradicted. Neither of the notes were endorsed, but all of the authorities hold that a deed of gift of promissory notes payable to order or bearer may be effected without endorsement by delivery. 14 Am. & Eng. Ency. of Law, 1022-32-29; 20 Cyc. 1202.

As to the pass book, the point, a very technical one made by counsel, is that a pass book delivered by the donor to the donee does not pass the money in bank unless it is a saving bank pass book, and they cite 20 Cyc. 1205. This rule here invoked is entirely too

technical, and the courts have held that a symbolic delivery of property can be made to uphold a deed of gift. It must be remembered that the instrument of writing of January 16, 1900, conveys the cash money, and this court will, of course, take notice that the common acceptation of the layman is that the money he has in bank is cash money; of course, the lawyers know that the legal relation between a bank and its depositors is that of debtor and creditor, but the question here is one of intention, and the layman considers money in bank as cash. The act of Mrs. Peavy delivering the bank pass book should not be considered independently of the conveyance she had theretofore made, but all the evidence should be considered together, and when so considered, it is entirely too technical to invoke this rule to defeat a palpably plain intention on the part of Mrs. Peavy to give H. P. Pace this money in bank. Many authorities of our own state recognize a symbolic delivery as effectual, and the intention of the testator along with his declaration at the time are all potential in construing the act. *Cardine* v. *Collins,* 7 S. & M. 428; *Young* v. *Young,* 25 Miss. 28-38; *Coppidge* v. *Barrett,* 34 Miss. 621; *Wheatley* v. *Abbott,* 23 Miss. 343.

We make one more observation which is to answer the contention that H. P. Pace by consenting to the probate of the will by executor Paine thereby is estopped to claim under the bill of sale, whether it be construed as such or as a deed of gift. There are none of the elements of estoppel in his conduct in this particular, taking every word that Mr. Paine says to be true. Estoppel operates, if it operates at all, here, against W. M. Pace, but estoppel cannot extend to that about which at the time there was no controversy and the truth of which was taken for granted. The validity of the will was not questioned or doubted by either the appellant or his brother and both asked for its probate. The question here is, what passes under the will? *Davis* v.

Bowmar, 55 Miss. 671; *Houston* v. *Witherspoon,* 68 Miss. 190.

Conduct, to work estoppel, must have been made with full knowledge of the facts by the party to be estopped, unless he asserts that to be true which does not know to be true and his adversary relies upon such statement to his injury. Silence, in the absence of knowledge of one's rights, does not work estoppel. *Thomas* v. *Romano,* 82 Miss. 256; *Yazoo Lumber Co.* v. *Clarke,* 95 Miss. 244; *Scottish American Mort. Co.* v. *Bunkley,* 88 Miss. 641.

Paine & Paine, for appellees.

As to the second division of counsel's argument in which they say if they are in error as to the character of Exhibit "B" then they insist it was a gift *inter vivos* or *causa mortis.* They concede that to constitute either there must have been a legal delivery of all property so given. The fact as to the delivery was one to be established by testimony and the chancellor, after hearing all the evidence, decreed there was no delivery and his decree, being based on conflicting evidence, is conclusive and should not be reviewed by this court.

But counsel in their brief accused attorney for appellees of technical pleading and quibbling; because it is urged in the demurrer and answer that there could be no delivery or change of money in the Bank of Aberdeen belonging to Mrs. Peavey merely by the delivery to appellant of her pass book, admitting, for the sake of argument, that such delivery was shown. This position is not technical pleading or quibbling. It is but the assertion of legal rights that inevitably follow the relation of banker and depositor or debtor and creditor. The only legal way a creditor can draw money from a commercial bank of discount, as was the Bank of Aberdeen, is by check or written order. Any other mode of doing so is unknown and unpracticed by bankers and the com-

mercial world. There could not be a symbolic delivery of the money in this bank except by a check or written order. Certain it is, that the possession of a person's bank pass book is no authority for the bank to pay out money belonging to the owner of the bank pass book, to a person merely having the possession of the book. The demurrer which reached this question is a new question in this state but it is good law supported by many excellent authorities and sustained by the chancellor's decree. The point raised by the demurrer and sustained by the chancellor is this: the mere possession of a bank pass book in a commercial bank of discount and deposit is no proof or evidence of the ownership of the money in bank; and therefore, the mere possession of a bank pass book in such a bank, is no evidence of a delivery nor could it be considered a delivery of the money in said bank. But if the bank had been a savings bank, then the rule would have been otherwise, as the bank pass book of a savings bank is accepted as the record of the depositors' account and its production authorizes control of the deposit. See 20 Cyc., pages 1239 and 1240 and the notes under page 1239, note 2, which shows that this rule is recognized as the law in the states of Alabama, Connecticut, Maine, Maryland, Massachusetts, New York, New Jersey, Ohio, Pennsylvania, Rhode Island, Vermont, England and Canada. The Bank of Aberdeen is a bank of discount and deposit as alleged by the sworn answer and admitted by counsel for appellant.

In conclusion, I submit, that the chancellor decided for appellees on conflicting facts or for the reason that appellant had not made out his case; and that the chancellor committed no error of law.

COOK, J., delivered the opinion of the court.

Mrs. M. E. Peavey made a will December 5, 1899, by which she devised all of her property, except some

furniture and an organ, to W. M. and H. P. Pace, brothers, "jointly in fee simple." Her attorney, G. C. Paine, was named as executor of the will. On January 16, 1900, Mrs. Peavey executed and delivered to H. P. Pace the following written instrument:

"The State of Mississippi, Monroe County.

"Know all by these presents, for and in consideration of one dollar paid to me, love, affection, and certain services rendered, have this day sold to H. P. Pace the following described property, to wit: All of my household and kitchen furniture, except two feather beds and steads, all live stock, such as horses, mules, cattle, hogs, etc., one surrey and one buggy, also all trust deeds, notes, accounts, and cash money, or so much thereof as I may possess at the time of my death. To have and to hold against the claims or demands of any person or persons whatsoever, and to his heirs and assigns forever. Witness my signature, January 16, 1900.

"M. E. PEAVEY.

"I hereby certify M. E. Peavey signed the above document before me this the 18th day of January, 1900.

"R. W. EIKNER, Justice of the Peace."

On December 30, 1910, Mrs. Peavey departed this life. After the death of the testator, her will was probated, and Mr. Paine qualified as executor.

During the last illness of Mrs. Peavey she sent for H. P. Pace, appellant, and delivered to him two notes, payable to her and signed by Sam Billups, and also her bank book, showing that she had on deposit in the Bank of Aberdeen five hundred and two dollars and forty cents, saying to him in the presence of others that she wanted him (H. P. Pace) to have all she had when she died. It is claimed by appellees that there is some conflict in the evidence as to whether or not Mrs. Peavey delivered one of the Sam Billups notes to Mr. Pace; but we think it is clear, from a reading of the abstract of the testimony of Mrs. Johnston about the Sam Billups

note, that she confused this note with another note, and that her testimony does not conflict with the testimony of the other witnesses. There seems to be no shadow of doubt that Mrs. Peavey intended to give to H. P. Pace all she then possessed. This is conclusively proven, and there is no evidence to the contrary.

The only question left for decision is: Did she succeed in carrying out her purpose? It makes no difference whether she made or attempted to make a gift *inter vivos*, or *causa mortis*, as the result will be the same. We think, however, she was making, or attempting to make, a gift *causa mortis*. Going back to the bill of sale executed January 16, 1900, we are of opinion that this instrument is only significant in establishing that Mrs. Peavey then intended to make H. P. Pace her heir, and the notes, trust deeds, accounts, and money mentioned referred to the money and evidences of debt she then possessed. The evidence, however, shows that Mrs. Peavey in her last illness still desired to make H. P. Pace heir of all she had at her death.

After the death of Mrs. Peavey, Mrs. Bowen, who nursed her during her last illness, claimed that she was entitled to five hundred dollars out of her estate, and appellant agreed with the executor and his brother that she should be paid out of the money in the hands of the executor. It also appears that the will was probated with appellant's consent, that appellant agreed to take under the will, and that he delivered to the executor the notes in controversy. It is insisted that appellant is now estopped to claim the notes, because he delivered them to the executor and made no claim to the notes at the time he turned them over to Mr. Paine. We are unable to discover any of the elements of estoppel in this transaction. Nobody was misled to his prejudice, or caused to give up anything because of his failure to claim the notes, or by his agreeing to the probate of the will. There is no contention that the instrument offered

for probate was not the will of Mrs. Peavey, and appellant's objection to the probate would have no weight.

The delivery of the notes to appellant perfected the gift of same, and the chancellor erred in holding to the contrary. 20 Cyc. 1206; *Ashbrook* v. *Ryon's Adm'r,* 2 Bush (Ky.), 228, 92 Am. Dec. 481.

It is claimed that the delivery of the bank book, evidencing the credit which the donor had in the bank of deposit and discount, sufficed to transfer this claim to appellant. The gift of such a bank book is not a sufficient delivery to sustain a gift *causa mortis. Jones* v. *Weakley,* 99 Ala. 441, 12 So. 420, 19 L. R. A. 700, 42 Am. St. Rep. 84; 20 Cyc., p. 1205. In the case of *Ashbrook* v. *Ryon's Adm'r,* 2 Bush (Ky.), 228, 92 Am. Dec. 481, the court differentiates the effect of the delivery of notes and the delivery of bank books. In that case the Kentucky court used language which seems to be pertinent to the criticism by appellees of the evidence in this case, which we quote:

"It is true that there is, as is usual, some difference in the statements of these various witnesses as to minor facts; but, instead of this impairing the value of their evidence on the main facts, it goes to preclude the idea that the evidence was manufactured."

The manifest intention of Mrs. Peavey was to give H. P. Pace all she possessed at the time of her death; but mere intention to give is insufficient to perfect a gift *causa mortis.* There must be a legal delivery of the thing given, and the delivery of the bank book, with a statement that she wanted him to have all she had, was not a delivery of her claim against the bank.

We can see no inconsistency in agreeing to the probate of the will of Mrs. Pace and the claim of appellant to her property. He is entitled to what she gave him by reason of the perfected gift, and he is entitled to one-half of the property disposed of by the will, because the will so provides. The effort of Mrs. Peavey to dispose

of all her property by gift failed in part, and therefore her will disposes of what property she possessed at the time of her death. Her bank deposit and the note in the hands of the executor, together with all other property not disposed of before her death, belong to her estate, and will be distributed according to the directions of the will. The two Billups notes are the property of appellant, and will be delivered to him by the executor.

Reversed.

MISSISSIPPI CENTRAL R. CO. v. A. T. MORRISON.

[65 South. 275.]

1. RAILROAD. *Injuries to animals on or near tracks. Actions. Questions for jury. Care required.*

Where in a suit against a railroad company for the killing of stock by its running train, the evidence showed that the train was properly equipped with all necessary appliances for safe use, was under control and that the engineer was on the lookout and as soon as he saw or could have seen the stock on the track did all he could by whistling and putting on the break to prevent the killing, but the same was unavoidable, a peremptory instruction for the defendant should have been given.

2. RAILROADS. *Injuries to animals on the track. Care required.*

A railroad company, in operating its trains, is only required to use reasonable care to prevent injury to animals on its tracks, such care as a discreet man would exercise, to avoid injury.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Suit by A. T. Morris against the Mississippi Central Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

H. S. Buescher, for appellant.

The only conclusion that this court can reach, after a careful inspection of all the testimony in this case, is that this was an accident which could not have been avoided by the exercise of reasonable care on the part of the employees of the railroad company, and that, therefore, the verdict should have been in its favor. *M. & O.* v. *Holliday,* 79 Miss. 279, 30 So. 820.

Currie & Currie, for appellees.

We cite the case of *Mobile & G. R. Co.* v. *Cadwell,* 3 So. 445. Proof of the fact of the injury and that it was inflicted by a moving train belonging to the defendant, makes out a *prima facie* case for the plaintiff; and the *onus* is then devolved on the defendant to overcome the presumption of negligence by proof of the circumstances attending the killing. We cite the case of *New Orleans & N. E. R. R. Co.* v. *Brooks,* and, by the way, this opinion appears to have been written by the able counsel of the appellant, reported in the 38 So. 40. Where, in the action for death, it was shown that the injury was inflicted by the running of defendant's train, the statutory presumption that the injury was the result of the defendant's negligence could only be rebutted by clear proof, by defendant, of facts exonerating it from blame. Many other cases could be cited sustaining the proposition that the burden is on the defendant in such case to exonerate itself from negligence. One other case we will cite as persuasive of this rule, and that is the case of *Mobile & Ohio R. R. Co.* v. *Tupelo Furniture Manufacturing Co.,* reported in 7 Southern Reporter, page 297. In this case it was held that where goods, which had been delivered to one carrier in good condition and were delivered by another in bad condition, the burden is on the delivering carrier to exculpate itself from liability by showing that the injury did not occur by its fault or default.

Instruction No. 1, granted the plaintiff by the court, is then, certainly correct, in so far as it places the burden on the defendant to exonerate itself. Now, the nice point raised is that the instruction is erroneous because it tells the jury that if the testimony for the plaintiff and the defendant is "equally balanced, then the law is for the plaintiff and the jury should so find. By reason, this must be true, because first, in that state of the testimony, the defendant has not exonerated itself; in the second place, any other rule would at once destroy the *prima facie* case and the presumption of negligence created by the statute, and it has been repeatedly held that this presumption alone is sufficient to support a verdict for a plaintiff in this sort of case.

We cite the case of *Vicksburg & M. R. Co.* v. *Phillips, Adm's,* reported in the Southern Reporter, page 537. "But it cannot be said to be erroneous to instruct the jury that the law presumes wrong and imputes blame from the fact of injury inflicted by the running of locomotive or cars; for that is precisely what section 1059 does. The same decision contains this language which is directly on the nice point raised in counsel's brief. If the evidence showing the injury rebuts the presumption, well; but if it does not, the presumption created by law from the fact of the injury in this mode is to stand and control.

This instruction is a practical copy of that complained of in the case of *Kansas City M. & B. R. Co.* v. *Doggett,* and upheld by this court, reported in 7 Southern Reporter, page 278. The language of that instruction is in part, and the burden of proof is upon the defendant to satisfy the jury, etc. Counsel should not become disgruntled because of the state of the law and vent his spleen therefor by imputations against the jury who tried this case, and indeed, all other juries who try cases against railroads. We believe the average juror is fair minded and honest and renders a verdict in response to

his conscience and judgment, after a fair and impartial consideration of the law and evidence. Certainly the imputation could not reach and bias or corrupt the trial judge, who sat and heard the testimony and observed the witnesses and their manners; who granted the instruction complained of and who refused a peremptory instruction and also, refused a motion for a new trial.

Instruction No. 2, complained of by counsel, is sound law and applies to the facts in this case. We quote from the case of *New Orleans & N. E. R. R. Co.* v. *Brooks,* reported in 38 Southern Reporter, page 40. There is yet another principle of law, well settled in this state, which required the submission of the case to the jury. It was shown beyond peradventure that the injury was inflicted by the running of the train. This was *prima facie* proof of negligence, authorizing a recovery by plaintiff. To overcome this statutory presumption, it devolved upon the appellant to exculpate itself by establishing, to the satisfaction of the jury, such circumstances of excuse as would relieve it from liability. But this statutory presumption cannot be overthrown by conjecture. The circumstances of the accident must be clearly shown and the facts so proven must exonerate the company from blame. If the facts be not proven, and the attendant circumstances of the accident remain doubtful, the company is not relieved from liability, and the presumption controls. Both the instructions complained of are shown to be based upon and supported by the decisions of this court and are correct in verbiage and principles of law announced, and rest upon testimony in the case.

REED, J., delivered the opinion of the court.

Appellant assigns as an error the refusal of the trial court to give a peremptory instruction in its favor. On April 15, 1912, at seven p. m., one of appellant's passenger trains ran into a herd of cattle and killed three. The engineer in charge of the train was the only person

who saw the accident. He testified that the train was running at a rate of speed which he estimated to be between twenty-five and thirty miles an hour when he first saw the cattle; that they were then on the side of the track, which was on a fill, and down near a ditch, and that he estimated they were about seventy-five or one hundred yards away; that the headlight on the engine appeared to blind them, and they got on the track; that he put on the brakes, sounded the whistle, and did everything he could to avoid striking the animals; that rain had fallen, it was then misting, the tracks were wet, and at the rate of speed he was traveling and the condition of the track he could not stop the train within less than four or five hundred feet; that the train was properly equipped with all necessary appliances for safe use, and was under control, and that he was on the lookout and saw the cattle as soon as he got around a curve, so they could be seen; and that he did all he could to stop the train, but could not do so in time to prevent the accident.

The testimony of other witnesses was corroborative of that of the engineer, except that the witnesses for the appellee estimated the distance to be about two hundred yards, rather than one hundred yards, from where the cattle were struck, to the curve. However, there was no measurement of this distance, and the testimony of all of the witnesses is based upon estimate only. It is undisputed that the engineer did what he could to prevent the killing of the stock. From the testimony, it appears that the accident was unavoidable.

A railroad company, in operating its trains, is only required to use reasonable care to prevent injury to animals on its tracks; such care "as a discreet man would exercise to avoid injury." *Railroad Co.* v. *Field,* 46 Miss. 573; *Railroad Co.* v. *Wright,* 78 Miss. 125, 28 So. 806. From the facts presented in this record, we think the appellant was entitled to the peremptory instruction. We

do not see in this case negligence on the part of the railroad company. *A. & V. R. R. Co.* v. *Boyles,* 37 So. 498; *Railroad Co.* v. *Greaves,* 75 Miss. 360, 22 So. 804; *Y. & M. V. R. R. Co.* v. *Frazier,* 61 So. 547.

Reversed, and judgment here for appellant.

Reversed.

R. C. BECKETT v. PLANTERS' COMPRESS & BONDED WAREHOUSE COMPANY.

[65 South. 275.]

1. CORPORATION. *Stockholders. Actions against third person. Loans. Misuse by borrowing corporation. Liability of officers. Action by stockholders. Conditions precedent.*

Where a bank loaned money to a corporation, knowing that the money was to be used for a purpose not authorized by the charter of the corporation, this does not in the absence of fraud on the part of the bank, render it liable to a stockholder of the corporation for loss resulting from the misuse of such funds.

2. CORPORATIONS. *Actions by stockholders. Conditions precedent.*

A minority stockholder of a corporation need not apply, as he is ordinarily required to do, to the directors or to the stockholders for redress before bringing a suit for the recovery of money misused where the directors, who have used the funds of the corporation for a purpose not authorized by its charter, own or control the majority of the stock.

APPEAL from the chancery court of Clay county.

HON. J. Q. ROBINS, Chancellor.

Suit by R. E. Beckett against the Planters' Compress & Bonded Warehouse Company and others. From a judgment sustaining a demurrer to the bill, complainant appeals.

The facts are fully stated in the opinion of the court.

Wiley H. Clifton, and *Roberds & Beckett,* for appellant.

A stockholder may object to an *ultra vires* act, or if the act be already committed, may hold the directors to account for it. 2 Cook on Corp. (6 Ed.), paragraphs 493, 663, and 482, and numerous authorities there cited. That the charter constitutes a contract between the corporation and its stockholders is a principle of law that has become firmly imbedded in the jurisprudence of modern times. *Harding* v. *American, etc.,* 182 Ill. 551.

Upon this principle of law rests the stability, permanence, and honesty of management of many corporations, and from it arises much of the confidence, safety, and protection of the stockholder himself. 2 Cook on Corp. (6 Ed.), par. 669; *Natuchs* v. *Irving,* 2 Cooper's Ch. 358, by Lord Eldon. I bow to the authority of *Natusch* v. *Irving.* The funds of a joint stock company established for one undertaking cannot be applied to another. If an attempt is made to do so, this act is *ultra vires,* and, although sanctioned by all the directors and by a large majority of the stockholders, any single stockholder has a right to resist it. Lord Chancellor in *Simpson* v. *Westminster, etc., Co.,* 8 H. L. Cas. 712. There can be no doubt that, if the directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, or dispose of its property, or pay away its money without authority, they may be required to make good the loss out of their private estates. 2 Cook on Corp. (6 Ed.), par. 682, and notes; Thompson, Liab. Off. 375, par. 16.

The directors, and stockholders participating with them, did an act clearly beyond their power, in using the entire capital stock of the Planters Compress and Bonded Warehouse Company, in erecting an ice factory and operating the Crystal Ice Company, and in that *ultra vires* act, they lost every dollar the Compress Company had. The said officers and stockholders applied said funds

of the Planters Compress Company in and for the erection and operation of an ice and cold storage plant, in which they were partners, and said funds were squandered in said ice and cold storage business and very great losses were incurred, etc. During the year 1905, the directors of the said Planters Compress & Bonded Warehouse Company, erected an ice plant, using the funds of the Planters Compress & Bonded Warehouse Company for that purpose; said ice and cold storage business was operated under the name of the Crystal Ice & Cold Storage Company and the directors applied the entire capital stock of the Planters Compress & Bonded Warehouse Company in the erection and operation of said ice and cold storage plant, so that within one year, more or less, the entire capital stock of said Planters Compress & Bonded Warehouse Company had been lost, etc. Amended Bill, Record pages 49 and 50.

The purposes for which this corporation is created are for the compression of cotton, and the storage of cotton, merchandise and other property in connection with such plant, and is authorized to buy, sell and lease any and all other real property, personal or mixed, in connection with and for the purpose above named, etc.

A corporation possesses only those powers which its charter or the statute confers, either expressly or as incidental to its very existence and so essential to the enjoyment of some special grant that without it, the right would fail. *Gaines* v. *Coates,* 51 Miss. 335 (1875); *Southern Electric Securities Co.* v. *State,* 91 Miss. 195 (1907), 124 Am. St. 638. As to what kind of power will be considered essential to corporate existence, and hence implied, in Mississippi, see, *McIntyre* v. *Ingraham,* 35 Miss. 25; *Lusk* v. *Lewis,* 32 Miss. 297.

That the directors, and other participators in the ice business, realized that such business was clearly *ultra vires,* is shown by the fact that they abandoned the corporate name of the Planters Compress Company and

conducted the ice and cold storage business under the name of the Crystal Ice & Cold Storage Company, and only the initiated knew that the ice company was using the funds of the Compress Company. The Bank of West Point, in paying out all the compress funds, knew that they were doing an illegal act, because Isham Evans was president of the bank and president and director of the Compress Company, and was, also, one of the partners in the Crystal Ice & Cold Storage Company.

An individual stockholder may bring suit against the directors and others, in his own name, for the benefit of the corporation, making the corporation a party defendant. *Hawes* v. *Oakland,* 104 U. S. 450; *Mount* v. *Radford Trust Company,* 93 Va. 427; *Porter* v. *Sabine,* 149 U. S. 478; *Young* v. *Alhambra, etc.,* 71 Fed. 810; 4 Thompson on Corp., par. 4479-4550. The stockholder must not be guilty of participating or acquiescence in the acts complained of. 4 Thompson on Corp., par. 4497. Participation, acquiescence, and estoppel are all expressly denied in the original bill.

Stockholders must show interest in the suit, by showing that if anything should be recovered, it would not be all taken up in paying creditors. *Wilkins* v. *Neville* (Miss.), 53 So. 594.

In this suit the original bill expressly shows that there are no creditors of the corporation except complainant. To enable a stockholder in a corporation to sustain, in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, there must exist, as a foundation of the suit, some action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization. *Hawes* v. *Oakland,* 104 U. S. 450. This is the leading case in this country on this subject, and reviews the previous decisions.

In this suit the foundation of the action is the act of the directors in control of the corporation, in diverting

the funds to the Crystal Ice and Cold Storage Company, and so losing them, which as shown above was absolutely *ultra vires* and illegal, and the act of the directors and other defendants who were partners in the Ice Company in knowingly receiving the funds of the Planters Compress & Bonded Warehouse Company without returning them. A stockholder, bringing a suit of this kind, must allege and prove that he requested the corporation to bring the suit. 3 Cook on Corp. (6 Ed), par. 740. But such allegation is not necessary nor proper where the corporation is still under the management or control of the guilty parties. 3 Cook on Corp. (6 Ed.), par. 741; 4 Thompson on Corp., 4504.

The original bill clearly shows that the corporation is still under the control of the guilty parties. Record page 12. The amended bill states even more clearly that the guilty parties are still in control. The whole history of equity jurisprudence presents the spectacle of a race of diligence and skill between the rogue and the chancellor. If the chancellor were tied down to fixed rules and methods of procedure, it is easy to see that the rogue would, in nearly all cases, come out ahead; for no sooner would the chancellor lay down some rule to circumvent roguery, than the ingenuity of the rogue would invent some means of circumventing the rule. And there is no better illustration of this than what we are now considering. If the shareholders had no relief against their unfaithful directors, except by assembling and electing a new board of directors, through whom to assert such relief, the directors could effectively destroy the rights of a minority of the shareholders, by getting and keeping control of a majority of the shares and constantly re-electing themselves to office. Again it is a principle that the law does not drive a man to do a vain thing; hence where the object of an action is to redress breaches of trust committed by the directors themselves, and where they hold or control a majority of the stock,

or are otherwise entrenched in power, that they cannot be dislodged through ordinary corporate action, it would be requiring the doing of a vain and useless thing to require the complaining stockholder to serve notice upon the directors to bring an action against themselves in the name of the corporation. 4 Thompson on Corp., par. 4504.

The nonsense of such a proceeding is heightened when it is considered that, as the directors wield the power of the corporation and appoint the counsel who represent it, such action would necessarily be collusive for they would be in a substantial sense both the plaintiffs and the defendants. 4 Thompson on Corp., par. 4504. No request is necessary where, in case the directors brought the suit, the suit would necessarily be under the control of persons opposed to its success, and where the directors themselves are the wrongdoers or the partisans thereof. *Steiner* v. *Parson,* 103 Ala. 215; *Davis* v. *Gimmel,* 70 Md. 356, Atl. Rep. 259; *Peabody* v. *Flint,* 6 Allen 52; *Brewer* v. *Theatre Company,* 104 Mass. 378; *Pond* v. *Railroad Co.,* 12 Blatch, 280; *Salmons* v. *Laing,* 12 Beav. 377; *Currier* v. *Railroad Co.,* 35 Hun 355; *Bricherhoff* v. *Bostwick,* 88 N. Y. 52; *Doud* v. *Railroad Company,* 65 Wis. 108, 25 N. W. 533; *Tazewell* v. *Farmers Loan etc., Co.,* 12 Fed. 752; *Smith* v. *Poor,* 3 Ware, 148.

To show control on the part of the guilty parties, it is not necessary to aver that they own a majority of the stock; all that is necessary to be averred, is such a state of facts as renders it reasonably certain that a suit by the corporation would be impossible, and that a demand on the managing body would be nugatory and vain. Pomeroy's Equity Jurisprudence, sec. 1095; *Rothwell* v. *Robinson,* 39 Minn. 1, 12 Am. St. Rep. 608; Morawetz on Private Corporations, sec. 242; *Eschwielder* v. *Stowell,* 78 Wis. 316, 23 Am. St. Rep. 411; *Loomis* v. *Missouri, etc., R. R. Co.* (1901), 165 Mo. 469, 488; *State* v. *Grant University* (Tenn. 1905), 90 S. W. 294; *Jacobson* v.

Brooklyn, etc. Co. (1906), 184 N. Y. 152; *Von Arnim* v. *American Tubeworks* (1905), 188 Mass. 151; *McConnell* v. *Combination, etc. Mining Co.* (1904), 30 Mont. 239; *Burrows* v. *Interborough, etc., Co.* (1907), 156 Fed. 389; *Williams* v. *Erie Mountain, etc., Co.* (1907), 91 Pac. 1091; *Young* v. *Alhambra Mining Co.*, 71 Fed. 811 (Judge Grosscup). If the directors are the guilty parties, a stockholder suing to prevent their running the corporation for the benefit of a partnership need not allege a request to them to sue. *Rothwell* v. *Robinson*, 39 Minn. 1.

No request to the directors of the company to bring the suit is necessary, where the directors are the guilty parties and a majority of the stockholders are participants with them, and have approved of their action. *Nathan* v. *Thompkins*, 82 Ala. 437; *Tillis* v. *Brown* (Ala. 1908), 47 So. 589; *Steiner* v. *Parsons*, 16 So. 6.

It has been held in Alabama, that the facts showing control of the defendant over the corporation must be stated with particularity and not as mere conclusions of the pleader. *Steiner* v. *Parsons*, 13 So. 771, as modified by *Steiner* v. *Parsons*, 16 So. 6.

J. J. McClellan and *A. F. Fox*, for appellee.

This is a suit instituted by a single stockholder of the Planters Compress & Bonded Warehouse Company against the said company and all of its directors and stockholders and also against the Bank of West Point. The original bill and all the amended bills in the case are unsworn to and the whole proceeding was begun and has been, at every step, to this date, without authority of the corporation or its directors or stockholders; and without appealing to the board of directors or the stockholders for a redress of the alleged grievances and without alleging in the original bill or in the several amendments thereto, any sufficient reason for not appealing to the authorities or the stockholders for redress. Accord-

ing to all the authorities which, so far as we know, are perfectly uniform in this question, it is a condition precedent to the rights of a stockholder to institute a suit in cases of this character, that he shall first apply to the board of directors for redress or to bring suit, and failing in this, it is his duty to apply to the stockholders. Every reasonable effort shall be made to obtain action on the part of the corporate authorities, and the facts showing all this shall be alleged in the bill clearly so as to convince the court that such an application for redress would have been futile.

We beg to call the attention of the court to a few of the leading authorities on this question. *Hawes* v. *Oakland,* 104 U. S. 450; *Quincy* v. *Steel,* 120 U. S. 241; L. Ed. 624; *Neal* v. *L. & N. R. R. Co.* (Ala.), 29 So. 865; *Roman* v. *Woolfolk,* 13 So. 212; *Steiner* v. *Parsons* (Ala.), 13 So. 771; *Montgomery Traction Co.* v. *Harman* (Ala.), 37 So. 371; *Tillis* v. *Brown* (Ala.), 45 So. 389; *Howzw* v. *Harrison* (Ala.), 51 So. 614; *Hagood* v. *Smith* (Ala.), 50 So. 374; *Decature Mineral & Land Co.* v. *Palm* (Ala.), 21 So. 315; *Montgomery Light Co.* v. *Lahey* (Ala.), 25 So. 1004; 10 Cyc. 975-76-77.

We might cite innumerable cases to the same effect as those above cited. They are uniform and we know of no conflict in the authorities, tested by the principles laid down in the above authorities.

SMITH, C. J., delivered the opinion of the court.

Appellant, complainant in the court below, is a stockholder in the Planters' Compress & Bonded Warehouse Company; and appellees, defendants in the court below, are the corporation, its directors, and the Bank of West Point. The bill alleged that during the year 1905 the directors of the Compress Company, without the knowledge or consent of complainant, abandoned the compress and warehouse business and invested the capital stock of the company in the erection of an ice and cold storage

plant, which plant was operated with the funds of the company for several years; that directors borrowed from the Bank of West Point the sum of forty-four thousand dollars, the bank knowing the purpose for which the money was to be used, and also that under its charter the company had no power to own and operate an ice and cold storage plant; that in order to liquidate this indebtedness it finally became necessary for the company to dispose of all of its property, there remaining, after the settlement of its debts, nothing to be distributed to the stockholders—and prayed that these directors and the Bank of West Point be held to account for this misuse of the company's funds. A demurrer was interposed to this bill, and sustained.

In so far as the Bank of West Point is concerned, no cause of action is stated by this bill. No fraud is charged against the bank, and, in the absence thereof, any knowledge it may have had of what disposition the company or its directors intended to make of the money borrowed from it is immaterial.

The grounds upon which it is sought to sustain the demurrer, in so far as the directors of the Compress Company are concerned, are:

"It does not appear from said bill that suit would not have been instituted in the name of the corporation, had proper application been made to the stockholders.

"It does not appear from said bill that complainant ever sought to have alleged wrongs redressed by the corporation or board of directors."

It is true that ordinarily, before a stockholder can maintain a suit of this character, he must exhaust all reasonable means within his reach to obtain redress within the corporation itself; and should the directors, when requested, decline to institute the suit, an appeal, if practicable, should be made to the stockholders themselves to take such action as they may deem proper and have the power to do. From the allegations of this bill,

however, it appears that the offending directors themselves either own or control the majority of the stock of the corporation, so that an appeal either to the directors or to the stockholders for redress was not necessary, for it is not to be expected that under such circumstances any redress would have been granted, and the law never imposes upon any one the doing of a vain and fruitless thing.

Reversed and remanded.

C. T. MITCHELL *et al v.* CHOCTAW BANK.

[65 South. 278.]

TRUSTS. *Construction. Interest of cestui que trust. Rights of creditors.* Where testatrix devised all her property to her husband in trust for her children, giving him power to use, control, manage, exchange and sell it or any part thereof and to make deed to the same, until each of the children should arrive at the age of twenty years, when it should be equally distributed among those living, and directing him in the meantime to support them out of the income, a child did not have such an interest in the property as could be subjected by a creditor to the payment of his debt, nor could the court enter a decree directing payment out of the amount which would be due such child when the time for distribution arrived.

APPEAL from the chancery court of Union county.

HON. J. Q. ROBINS, Chancellor.

Bill by the Choctaw Bank against C. T. Mitchell and others. From a judgment overruling their demurrer, defendants appeal.

The facts are fully stated in the opinion of the court.

Jones & Knox, for appellant.

The will made an exhibit to the bill creates an active trust, and if the defendant, C. T. Mitchell, in the court

below, had any interest in the estate under the said will, the court will not condemn it for the sale of his debts. *Stancel et al.* v. *Hahn et al.*, 69 Miss. 616; *Hill* v. *Fuller et al.*, 39 So. 53; *Murdock* v. *Murdock*, 97 Miss. 690. Appellant, C. T. Mitchell, under the will, will inherit part of the estate if he should live until the youngest child becomes of age, and there is any part of the estate on hand at that date. Where there is only a contingent estate and that estate is under a will which creates an active trust, then said estate cannot be condemned for the debts of the legatee under said will.

To carry out the prayer of appellee's bill would be to tie the hands of the executor under said will, becloud the estate, and virtually tie up the property under said active trust. See authorities above. The purpose of the will, made an exhibit to the bill, was that said estate should be used to support and maintain the children of the executrix, and no part of said property should be condemned for debt. *Leigh* v. *Harrison*, 69 Miss. 923.

Anderson & Long, for appellee.

There is no doubt that the will creates an active trust, but this does not necessarily mean that whatever interest C. T. Mitchell has in the property cannot be reached by his creditors. It is not a "spendthrift" trust, and has none of the ear-marks, and not attempted to be made such by the testatrix. It may be that the court will not condemn the interest of the appellant, C. T. Mitchell, for sale to pay his debts, but under the prayer for general relief, the court does not have to do this, but has the power and right, and it is its duty to do so, to solve this matter so as not to interfere with the trust, and merely order the trustee, when the time arrives for the distribution of the estate, to pay to appellee its debts and costs of this cause, before he pays anything to C. T. Mitchell or his assignees.

Let us see what interest, appellant, C. T. Mitchell, has in this property; the bill states, and the demurrer con-

fesses, that his interest is worth fifteen thousand dollars, and it is a well-known rule of construction, that in the ascertainment of what equitable title a party has to property, the same rules of construction are applied, as are applied in arriving at the character of legal title held by a party to property; 39 Cyc., page 228, sub-section 3.

Chancery is the proper and only forum in which the rights of appellee could be enforced in this matter. It is the only court that can protect the rights and interest of all parties. The legal title to this property is now in the trustee, and will so remain until the youngest child of the testatrix arrives at the age of twenty-one years. This legal title vested in the trustee immediately upon the death of the testatrix. The trustee, under the will, has no equitable estate, but only the legal title, with the power and authority to do the acts in reference to the property, of which the testatrix died seised and possessed, set out in the will. The equitable title to the one-sixth interest of C. T. Mitchell, immediately upon the death of his mother, vested in him, and this equitable title was perfected in fee simple, subject only to be defeated on the death of the said C. T. Mitchell before the youngest child of the testatrix arrives at the age of twenty-one years. In other words, it was a condition subsequent and therefore, the equitable title vested in C. T. Mitchell to the one-sixth interest in his mother's estate (there being six children at the time of her death), immediately upon her death. The only condition upon which this equitable title could possibly pass out of him, would be his death before the youngest child of the testatrix arrived at the age of twenty-one years. *Presley* v. *Rogers,* 24 Miss. 523. In the case of *Lee* v. *Harrison,* 69 Miss. ——, the will created what is known as a "spendthrift" trust, was upheld and relief to the creditors denied, but in the last paragraph of the opinion, bottom of page 938 and top of page 939, the court practically says that if the question had been presented to the court, that

the income from the estate was more than sufficient to support the beneficiary in the will; that the claim could be and would be adjusted by a court of chancery, to the claim of creditors. There was no question about the trustee in this case being in active charge with all kinds of power under an active trust.

As illustrative and instructive of the kind of an estate now held and so held by appellant, C. T. Mitchell, in this property by virtue of his mother's will since her death, see; Column 1, 31 N. E. Rep., p. 916. The case of *Stancel et al.* v. *Hahn et al.*, 96 Miss. 616, cited by appellants, was an attempt to sell, under execution at law, the equitable interest of a beneficiary in trust property, where there was an active trust, and has absolutely no application to the principles involved in the present case. It was an attempt under an active trust, and, it has been repeatedly held that this section cannot be proceeded under, to subject interest so held. We confess that we are unable to see what application the case of *Murdock* v. *Murdock*, in 97 Miss. cited by appellants, has to the present case. The case of *Hill* v. *Fulmer et al.*, cited by appellantes, in 39 So. 53, would be applicable, if this were a proceeding to attempt to subject any interest that one of the children of appellant, C. T. Mitchell, might have in said property, in case of the death of its father before the youngest child of the testatrix became twenty-one years of age. This was also an attempt to sell, under execution at law, instead of by proceeding in chancery.

There are two well-defined classes of trust estates. One, in which the trust is a mere or passive trust, in which the trustee has the bare, naked legal title, with no duties to perform, and a trust estate so created, may be sold under execution at law, as provided by our statute, and as repeatedly decided, this is the only kind of trust estate that can be reached by execution.

An equitable interest held by a beneficiary under an active trust, can only be reached by proceedings in eq-

uity, and can always be reached, if the beneficiary has a present, valid, equitable interest, and the subjection of the same will not interfere in the execution of the trust, unless the trust created is what is known as a "spendthrift" trust.

Let us see if a court of equity has the power to protect the rights of this creditor of appellant, C. T. Mitchell, and at the same time, not interfere with the execution of the trust by the trustee. It may be that if this interest was actually sold out, and an attempt was made to put the purchaser in possession of the property, then this would interfere with the trustee, but it is not to be presumed that the court will order this done, when the prayer of the bill is for general relief, and the court could simply declare a lien in favor of appellee, for the amount of its debts, with interest and the costs, and order the trustee, when the time arrives for the distribution of said estate, before paying appellant, C. T. Mitchell, or his assignees, anything to first pay off and discharge the debt of appellee, or the court could make an order that the trustees go ahead with the administration of the trust estate, and when same was divided, and the share or interest of appellant, C. T. Mitchell, was ascertained and set aside, that it would be held by the said C. T. Mitchell, or his assignees, subject to lien in favor of appellee for the amount of its debt, etc., and perhaps there are other safe and satisfactory ways in which the rights of all parties could be protected and the discharge of the duties of said trustee be interfered with in no way at all.

REED, J., delivered the opinion of the court.

Appellee, the Choctaw Bank, filed its bill in chancery court, seeking to subject the interest of appellant C. T. Mitchell in the estate bequeathed and devised by his mother, Mrs. Mattie R. Mitchell, to the payment of the indebtedness owing by him to appellee. To show the

interest of C. T. Mitchell in the estate, we quote from his mother's will as follows:

"I will and bequeath unto all my children, jointly, who may be living at my death, the following real estate in Union county, Mississippi, to wit: (Here follows the description of the land.) Also all my personal estate which I may own and possess at the time of my death, it being my desire and intention to give all my property real and personal of every kind and description, which I may own at my death, or have any interest in, to all of my children then living, jointly and equally.

"I hereby appoint my husband, Geo. S. Mitchell, trustee, for all of said children, to take at my death charge and control of all of my said property mentioned in this will, and direct and empower him to use, control, manage, exchange and sell it, or any part of said property, as in his judgment may be best for the interest of my children, he to support them out of the same, and to do with the same as he thinks best for them, and he is hereby authorized to sell, make deeds, give receipts and as fully control, manage, receive and in any way dispose of any and all of said property, as he in law could do if it were his own absolutely, in fee simple, without any order of any court, and he is not to account to any court for the same in any manner whatever, nor is he to be liable for any loss or damage or mistake in the management of said property to any one.

"The said Geo. S. Mitchell is to control said property as set forth in item II of the will, until all my children are twenty-one years of age, and then divide the same equally among them, and if any die leaving children, then their children to have the share of their parent.

"I hereby appoint my husband, Geo. S. Mitchell, my executor to carry out this will, and he shall not be required to give any bond or security as such, nor to report or account to any court whatever, as such executor, but in all connected with the same, he is to use his best

judgment and do what he thinks is best for all parties in interest."

The bill prayed for an accounting from Geo. S. Mitchell, who is in active charge of the estate as trustee and executor, showing what property he held and the income therefrom. There is also in the bill a prayer to cancel certain assignments and transfers made by C. T. Mitchell to his wife and to a firm of attorneys. The prayer of the bill then continues as follows:

"And that the interest of the said C. T. Mitchell in said property be condemned to be sold to pay complainant's said debt, interest, attorney's fees, and cost of this cause, and that, if necessary, a sufficient amount of what is now in the hands of Geo. S. Mitchell, as executor and trustee, be condemned to be paid by him to this complainant to pay its said debt, interest, attorney's fees, and court costs in this cause."

The bill also contains a prayer for general relief.

Appellants filed an answer, denying fraud charged in appellee's bill, and also filed a demurrer to the bill. From the decree of the chancery court, overruling the demurrer, this appeal has been prosecuted.

The will created an active trust, which is now in the course of operation. A beneficiary's interest, such as that shown in this case, is not subject to sale under execution. *Presley* v. *Rogers,* 24 Miss. 520; *Hill* v. *Fulmer,* 39 So. 53; *Stansel* v. *Hahn,* 96 Miss. 616, 50 So. 696. There can be no interference with the execution of the trust created by the will. The trustee is given complete charge, control, and management of the estate. What he is to do, for the interest of the beneficiaries, and in managing and disposing of the property, is committed to his judgment. He is directed to support the beneficiaries, the children of the devisor, out of the estate; but the control and disposition of all of the property is given to him fully, and just as if it were his own, absolutely, in fee simple. He can act without order of court, and

is relieved from accounting in any manner whatever, and from liability for loss or damage or mistake in the management of the property. A wide discretion is conferred upon him.

C. T. Mitchell, upon the death of his mother, was vested with an equitable title in one-sixth interest of the property left by her, subject to be defeated by his death before her youngest child reaches the age of twenty-one years. Until the time for distribution arrives, he has no right to receive any part of the estate, other than that which might be expended by the trustee for his support. During the time he cannot have set apart to him any share of the property. He has no right to use, or to control, manage, or dispose of, any of the property devised. He has only a beneficial interest, which will not ripen into a legal title until his mother's youngest child shall reach legal age. Until then the trustee has unqualified authority and power in the possession, use, management, and disposition of all of the property. This express trust in property was given by the owner thereof in her last will and testament.

"The owner of property may, in the free exercise of his bounty, so dispose of it as to secure its enjoyment to the objects of his bounty, without making it alienable by them, or liable for their debts, and this intention, clearly expressed by the founder of the trust, must be carried out by the courts." 1 Perry on Trusts, sec. 386a; *Nichols* v. *Eaton,* 91 U. S. 716, 23 L. Ed. 254.

A donor may make such disposition of his property and provision for the application of the revenues therefrom for the support of his beneficiaries, and bestow upon the trustee such discretion as to render the estate, or the interest of a beneficiary therein, not liable to be subjected to the payment of the beneficiary's indebtedness. A donor has the right to devise his property for such purpose that neither the beneficiary nor his creditors can divert the property from the appointed purpose. 1

Perry on Trusts, sec. 386a. We quote from 38 Cyc. 238, the following:

"Where the property is held in trust to receive the rents or income thereof, and to apply such rents or income to the support of the *cestui que trust,* who consequently has no present right of enjoyment or power of alienation, his interest in such property cannot be reached by his creditors."

There can be no question as to the right of Mrs. Mitchell, the devisor, to dispose of her property as she has done in her will. *Leigh* v. *Harrison,* 69 Miss. 923, 11 So. 604, 18 L. R. A. 49. It is clear to us that the prayer of the bill asking that the interest in the estate of C. T. Mitchell be condemned to be sold to pay appellee's indebtedness, and that a sufficient amount in the hands of the trustee and executor be condemned to pay such indebtedness cannot be granted and carried into effect.

It is suggested by counsel for apppellee that the chancery court has the power to enter decree for relief of appellee and to insure the collection of its indebtedness against C. T. Mitchell by directing a payment of the amount which will be due him when the time arrives for the distribution of the estate, and by subjecting his interest in the estate for that purpose in such manner as not to interfere with the trust. They further suggest that a lien could be declared on the interest of C. T. Mitchell in favor of appellee for the amount of the indebtedness owing.

We have carefully considered these suggestions. We do not see how they can be put into effect. It appears to us that the chancery court is powerless to enter a decree which would be effective. C. T. Mitchell's interest is uncertain and contingent. Its value now cannot be ascertained. Until the time for distribution under the will arrives, he will only receive such amount as the trustee may give him for his support. There is no provision for payment to him of any surplus from the income. If he

dies before the time for distribution, there is nothing from the trust for his estate. He has not such property under the will as may be impressed with a lien. The amount which he may eventually receive from the trustee is so uncertain, contingent, and speculative as hardly to be the subject for the court's disposition by decree. The attempt to enforce such orders as are desired by appellee will result in the interference with the execution of this active trust. We believe that the chancellor should have sustained the demurrer.

Reversed, and decree entered here sustaining the demurrer and dismissing the bill.

Reversed.

Z. W. JORDAN *v.* MISSISSIPPI CENT. R. R. CO.

[65 South. 276.]

1. CARRIERS. *Carriage of goods. Connecting carriers. Injury to goods. Actions. Evidence. Code* 1906, *section* 4853. *Laws* 1908, *chapter* 196. *Best and secondary evidence. Notices. Loss of primary evidence. Clerks of courts. Compensation. Forfeiture of fees.*
Where goods shipped over connecting lines are delivered to the consignee in a damaged condition, and it is proven that they started on their journey in good condition, the carrier thus delivering them to the consignee will be liable for the damages, unless it shows that the injury did not occur through its fault.

2. CONNECTING CARRIERS. *Actions. Evidence.*
Where goods shipped over connecting lines were shown to have been delivered to the consignee in a damaged condition, it was error to exclude evidence that they were in good condition when delivered to the initial carrier, on the theory that delivery to the carrier was thereby assumed "without proof having been made," such delivery having been shown by the bill of lading.

3. CARRIAGE OF GOODS. *Connecting carriers. Injury to goods.*
The rule that a connecting carrier, delivering goods in a damaged condition which it received from the initial carrier in good con-

dition is liable therefor, unless it shows that the injury was not its fault, is not in conflict with Code 1906, section 4853, providing that if such a carrier fails to furnish certain records it shall be presumed to have caused the damage, since the statute merely makes a conclusive presumption under such circumstances, instead of a *prima facie* one.

4. EVIDENCE. *Best and secondary evidence. Notice to produce.*
Under Laws 1908, chapter 196, providing for the recovery of a penalty if the carrier failed to settle a claim after sixty days written notice, such written notice is the best evidence and evidence of its contents in the absence of proof of its loss or failure to produce after notice, is not admissible.

5. EVIDENCE. *Best and secondary evidence. Loss of primary evidence.*
Parol evidence of the contents of a letter is admissible when it is proven that the letter has been lost.

6. CLERKS AND COURTS. *Compensation. Penalty and forfeitures of fees. Rule* 1.
When a clerk of the lower court fails to incorporate the bill of lading introduced in evidence in the lower court in his transcript to the supreme court, and gives no excuse for his failure so to do, under rule No. 1 of the supreme court, his fees for making up the transcript will be disallowed.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Suit by Z. W. Jordan against the Mississippi Central Railroad Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

J. T. Garraway and *J. W. Shanks,* for appellant.

Appellee is trying to escape and evade the payment for the loss and damage of the goods, on the ground that the plaintiff below did not show that the appellee ever received the goods in good condition, or that it was their road on which the loss and damage occurred, and that if any contract to deliver the goods were made, it was with the I. C. Railroad and not the appellee and that they are not liable.

We submit that such a condition is in the face of the facts in the record untenable and that the records show conclusively and is undenied that the goods were received by the appellee and delivered at Sumrall immediately in a broken and damaged condition, and they cannot justify on such an unwarranted contention under the decision of any court on the broadest construction that can be given them compatible with justice, common sense and reason, and we submit that, under the facts in the record, the burden of proof was on the appellee to show that the damage did not occur on its line through its fault, and invite the court's attention to the case of *Railroad Co.* v. *Tupelo Furniture Co.*, 67 Miss. 35, 7 So. 279; also *Fayson* v. *R. R. Co.*, 69 Miss. 569, 13 So. 37. If the appellee's contention was that this was a case of connecting carriers they would still be liable as the last carrier under the rulings of the court in above-cited cases. There can be no question about the appellee having received this shipment of goods and there can be no question about the appellee's agent having undertaken to issue a bill of lading, and if he issued a bill of lading on one of the blank forms of the I. C. Railroad, or had issued no bill of lading at all, it would make no difference when it was shown that the appellee received the goods for shipment to be delivered at destination, and if there should have been any controversy about this it would have been a case of fact for the jury to have passed upon and would have been error for the court to have given the appellee a peremptory instruction. We submit that this principle is set at rest in the opinion of the court in the case of *Tishomingo Saving Institution* v. *Johnson, Nesbit & Co.*, 40 So. 503.

The delivery of this shipment in question and the acceptance by the appellee's agent at the Union Freight Office of the appellee and the I. C. Railroad at Brookhaven, is *prima facie* evidence of itself and was sufficient without any bill of lading, that the appellees

accepted the goods in question and placed upon them the burden of showing that the goods were not lost nor destroyed on their line of railroad (see *Alabama Midling Ry.* v. *Darby,* 24 So. 713). Where the evidence authorizes the finding that certain goods were delivered to the agent of a railroad company who received them and was made acquainted with their destination, a contract of carriage may be implied, although no bill of lading or receipt was issued for the goods. See *Southern Ry.* v. *Johnson,* 58 So. 333.

Where it has been shown that property was delivered to a common carrier or its duly authorized agents and has not been delivered to the consignee or delivered in a damaged condition, the burden is on them to show that they were not guilty of negligence and liable. See *Whitesides* v. *Russell,* 8 Watts & S. 44; *Van Winkle* v. *South Carolina Ry. Co.,* 38 Ga. P. 32; *Davidson* v. *Graham,* 2 Ohio St. 141. In the opinion of the court in the case of *Railroad Co.* v. *Tupelo Furniture Co.,* 67 Miss. 35, the court said: "Where goods, shipped over connecting lines, are delivered to the consignee in a damaged condition and it is proven that they started on their journey in good condition, the carrier, thus delivering them to the consignee, will be liable for damages unless it shows that the injury did not occur through its fault." And the case at bar is a much stronger case and presents facts showing that no other railroad but the appellees herein handled the goods in controversy, and they now seek to evade the payment of this claim on the grounds that the plaintiff below did not show the appellee to be liable, when in the face of the decisions of all the courts, after it is shown that they came into possession of the goods, the burden was on them to show that it was no fault of theirs, and the objections and technicalities taken advantage of in the lower court is without a parallel, and is not justified by the decision of any appellate court.

It matters not whether a bill of lading was produced or not, or what was on the bill of lading if produced, provided that it was proven that the railroad company received the goods in good condition for transportation. In an action against a common carrier for the loss of goods, his receipt of the goods may be proved without producing a bill of lading or even accounting for the loss of a bill of lading. See *L. N. Railroad Co.* v. *McGuire,* 76 Ala. 295.

H. S. Buescher, for appellee.

Appellee here, defendant below, secured a peremptory instruction at the close of appellant's testimony, requiring the jury to find for the defendant. This is assigned as error by appellant, and he quotes in support of his contention, a great deal of law, which is all good, although some of it is obsolete, but which is not in any sense applicable to the facts of this case. This is a suit based on a breach of written contract in which appellant contends that appellee received, in good condition at Brookhaven, Mississippi, and agreed to deliver to appellant at Sumrall, Mississippi, certain household goods specifically set out in said contract. The contract sued on in this case is a written one and is in the form of a bill of lading, and is in evidence. Appellant must stand or fall by its provisions. It speaks for itself. No evidence is competent to vary, change, alter, modify, add to or contradict any of its provisions.

It must stand on its own bottom. This contract shows on its face to have been made by the appellant with the Illinois Central Railroad Company, whose railroad connects with appellee's road at Brookhaven.

To this contract, appellee can, under no theory of law, be held to be a party. It could be held liable, if at all, as a connecting carrier only and the burden of proving that appellee had received the goods sued on in this case, in good condition at its connecting point with the Illinois

Central was on appellant, unless he showed that he had invoked section 4853, chapter 139, of the Code of 1906. There is no evidence here that this chapter is relied upon and the burden of proof, therefore, remained with the appellant to show that the goods were received by the Mississippi Central Railroad Company in good condition at Brookhaven, Mississippi. *Railway Company* v. *Tupelo Furniture Co.*, 67 Miss. 35, to the contrary, which decision was rendered prior to the enactment of the section referred to above, and is no longer applicable.

Even should the court hold that there is evidence showing delivery to Mississippi Central Railroad Company regardless of the Illinois Central Railroad Company's bill of lading, there is not one word of testimony in this record to show their good condition at the time of the alleged delivery. There being no evidence to that effect, and there being no Mississippi Central Railroad Company bill of lading in evidence, the burden placed upon appellant to show delivery of the goods to the appellee and their good condition at the time of delivery, has not been met. Note section 4851, chapter 139, Code of 1906, reading as follows: Every bill of lading or other instrument in the nature or stead thereof, acknowledging the receipt of property for transportation, shall be conclusive evidence in the hands of a *bona fide* holder for value, whether by assignment, pledge, or otherwise, as against the person or corporation issuing the same, that the property had been so received. This section makes a bill of lading, issued by a common carrier, conclusive evidence in favor of a *bona fide* holder as against the carrier receiving the property that the carrier received the property. *I. C. R. R.* v. *Lancashire Ins. Co.*, 76 Miss. 114, 30 So. 43.

It is elementary that before appellant can recover, he must prove each and every material fact of the case by the preponderance of the evidence. Before damages can

be recovered, it is necessary that the appellant show actionable negligence on the part of the appellee. Actionable negligence is the failure to use such care in the discharges of a given duty as is sustained by the one towards whom the duty exists.

Before appellant was entitled to recover in this case, it was necessary for him to prove, by the preponderance of the evidence, such a violation of duty on the part of the railroad company. This he failed to do, and the motion was therefore properly sustained by the circuit court.

SMITH, C. J., delivered the opinion of the court.

This is a suit instituted in the court below by appellant to recover from appellee damages for the breaking of certain household furniture and other articles shipped by plaintiff to himself from Brookhaven to Sumrall. At the close of the evidence a peremptory instruction was granted for appellee, and there was a verdict and judgment accordingly. Brookhaven is the intersection of the roads of appellee and of the Illinois Central Railroad Company, which companies maintain a joint freight depot in charge of a joint agent. The furniture and other household articles in question were delivered by appellant at Brookhaven to this joint agent of the two roads for shipment to Sumrall, a station on appellee's road, and were afterwards delivered by appellee to him in a damaged condition.

The bill of lading issued to appellant by this joint agent when the articles were delivered to him for shipment does not appear in this record. When it was first offered in evidence, it was excluded on the ground that it was signed by this agent as agent of the Illinois Central Railroad Company, and not as agent of appellee; but afterwards it was admitted, and the case tried on the theory that appellee had received the goods from a connecting carrier.

We will assume, without deciding, that appellee's liability is simply that of a connecting carrier, for two reasons: First, because the bill of lading introduced in evidence has not been copied into this record; and, second, on the evidence introduced and sought to be introduced in the court below it is immaterial whether appellee received the goods itself in the first instance, or from a connecting carrier, the rule being:

"Where goods shipped over connecting lines are delivered to the consignee in a damaged condition, and it is proven that they started on their journey in good condition, the carrier thus delivering them to the consignee will be liable for the damage, unless it shows that the injury did not occur through its fault." *M. & O. R. R. Co.* v. *Tupelo Furniture Mfg. Co.*, 67 Miss. 35, 7 So. 279, 19 Am. St. Rep. 262.

According to the evidence the goods were delivered to the consignee in bad condition and appellant offered, but was not permitted, to prove that they were delivered to the initial carrier in good condition. This evidence seems to have been excluded on the theory that delivery to the carrier was thereby assumed, "without proof having been made." Proof of delivery to the carrier, however, had already been made by the bill of lading offered in evidence, and the evidence excluded was competent for the purpose of showing the condition the goods were in when delivered, and should therefore have been admitted.

There is no merit in appellee's contention that the rule announced in the case of *Mobile & Ohio R. R. Co.* v. *Tupelo Furniture Manufacturing Co.*, supra, has been abrogated by section 4853 of the Code of 1906, which section, according to the brief of counsel for appellee, was enacted after that case was decided. This section of the Code provides that upon the occurrence of certain things therein set forth, the loss or damage shall be conclusively presumed to have occurred where the goods were in the

hands of the last carrier, while the rule announced in the Tupelo Furniture Company Case is simply a *prima facie* one, which results solely by reason of the delivery of the goods to the initial carrier in good condition, followed by delivery to the consignee by the last carrier in bad condition. There is no conflict between the two rules, and one has no bearing on the other.

The motion to exclude appellee's evidence, made at the conclusion of the introduction thereof by counsel for appellee, and which was sustained by the court, was as follows:

"Now comes the defendant and moves the court to exclude all the evidence offered on behalf of the plaintiff, and instruct the jury to find for the defendant, for the reason that there is no evidence here to show that the Mississippi Central Railroad Company was ever in possession of the goods claimed to have been damaged, and, there being no evidence to show that the Mississippi Central Railroad Company ever received the goods, they, of course, could not be held liable for any damages. Second, it has not been shown that, if the Mississippi Central Railroad Company did receive the goods, they were received in good condition; the burden of proof being on the plaintiff to show that they were in good condition."

The evidence that appellee had "received the goods" and had been in possession thereof was the fact that they were transported to Sumrall over its line and by it delivered to appellant. No evidence was introduced showing that the goods were received by the initial carrier in good condition; but, as hereinbefore stated, it was offered by appellant, and excluded.

Appellant sought to recover, in addition to his actual damages, the penalty provided by chapter 196 of the Laws of 1908, because of appellee's failure to settle his claim within sixty days after it had received written notice of his demand therefor. Evidence was introduced

that such notice had been given to appellee's claim agent; but it was excluded, on the ground that the writing itself was the best evidence. This ruling was correct. Appellant should have given appellee notice to produce the writing, and, if produced, it constituted the best evidence of its contents; but, if appellee had declined to produce it after receiving a notice so to do, the evidence of its contents sought to be introduced by appellant would then have been competent.

Counsel for appellant testified that he had notified appellee's claim agent in writing of appellant's demand, and had received from this claim agent a letter acknowledging recepit thereof. After proving the loss of the letter, he sought to establish its contents by parol; but, on objection, the court excluded the evidence, and erred in so doing.

The clerk below failed to incorporate the bill of lading introduced in evidence in the court below in this record, and gives no excuse for his failure so to do; consequently, under rule No. 1 (59 So. vii), his fees for making up the transcript will be disallowed.

Reversed and remanded.

S. E. STARK v. WESTERN UNION TELEGRAPH COMPANY.

[65 South. 279.]

1. TELEGRAPHS AND TELEPHONES. *Operation. Action for damages. Sufficiency of evidence. Willful neglect.*

The measure of liability of a telegraph company for failure to transmit a message to plaintiff's father to meet a train with a rig, as plaintiff's child was sick, was properly limited to nominal damages, where it was not shown that the child's death was proximately caused thereby, on account of exposure in carrying her to his father's house.

2. TELEGRAPHS AND TELEPHONES. *Operation. Willful neglect.*

It was not reckless, willful or intentional negligence, where a telegraph company's agent simply forgot to deliver a message to the operator for transmission, the message being a request to meet the sender with a rig as his child was sick.

APPEAL from the circuit court of Tallahatchie county. HON. N. A. TAYLOR, Judge.

Suit by S. E. Stark against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Gary & Rice, W. R. Woods and *Alexander & Alexander,* for appellant.

We submit that there can be no sort of controversy as to Stark being compelled to walk from the depot to the home of his father, due to the failure of the appellees to transmit the telegram in question, nor as to Stark being compelled to carry his child in his arms for that distance nor as to the death of the child by strangulation. The annoyance and discomfort of the walk was an element of actual damages. The physical exertion of carrying the child in his arms for a distance of nearly a half mile was also an element of actual damages. And the strangulation—physical suffering of the child was another element of actual damage. And so we say that for these three items or elements of damages the jury should have been allowed to award compensatory damages, if they saw fit to do so under the evidence. *Telegraph Co.* v. *Hobart,* 89 Miss. 261; *Telephone and Telegraph Co.* v. *Jackson,* 95 Miss. 84; *Railway Company* v. Bloom, 71 Miss. 247.

If the negligence of the telegraph company aggravated the disease with which the child was suffering, or hastened her death, the telegraph company is liable. 3 Southern Reporter 902, and note at page 905; 9 Southern Reporter 363; 13 Cyc. 31 (Ill.), 11 S. W. 493 and 1 L.

R. A. 378. "It may be said, in the instant case, that an excuse was offered; but it was a question of fact to be decided by the jury as to whether this excuse was sufficient, and, in fact, whether the statements made by the agent of the appellant amounted to an excuse." *Telegraph Cable Co.* v. *Christian,* 102 Miss. 851. "In truth all of appellant's testimony, regarding the handling of the message, was for the jury's consideration, and the jury had the power to say whether they believed or disbelieved such testimony." *Telegraph Cable Co.* v. *Christian,* 102 Miss. 851. And how much greater reason was there in the case at bar for the jury to disbelieve the testimony of A. L. Murphy, co-defendant, who made statements diametrically contradictory, the one with the other, touching the matter of the telegram in question. If the jury chose to disbelieve the testimony of A. L. Murphy, co-defendant, as it had a right to do under the law, then no sort of excuse was offered for the non-transmission of the telegram, and that being true, the law is, that the company is guilty of gross negligence, and being guilty of gross negligence, punitive damages may be assessed. SMITH, C. J. said, in the case of *Steinberger* v. *Western Union Telegraph Co.,* 97 Miss. 260: Since appellee not only violated its duty to appellant by not delivering the telegram, but offered no excuse at all, therefor, the jury could hardly escape the conclusion that its conduct in the matter was so grossly careless as to indicate a total disregard of appellant's rights." "It was the province of the jury to decide that appellant's conduct in the matter was so grossly careless as to indicate a total disregard of appellee's rights." *Telegraph Cable Co.* v. *Christian,* 102 Miss. 851. If the telegraph company saw fit to employ A. L. Murphy, as its representative and agent to serve the public, who was the agent of another master, the railroad company, it was the incurring of obligations, the performance of which might become incompatible with each other, and it

was no excuse to appellant, the party aggrieved by the default in this case, that inconsistent obligations had been assumed. 32 Miss. 46 and 47; 25 S. W. 168 and 1036; 16 S. W. 25; 2 N. E. 604 and 608; Scircle case, 8 Annotated Cases 469, 470 and 472. And we also call particular attention to the dissenting opinion in the case last cited, the Kernodle case, which is not in conflict with the majority opinion on the point here made. The questions of fact involved under this suggestion were for the jury, and particularly is this true in view of the fact that the record shows that A. L. Murphy, co-defendant was flatly contradicted as to the matter of the message. See record pages 161 and 162, *Telegraph Cable Co.* v. *Christian,* 102 Miss. 851, in holding that the agent or servant of the telegraph company, a common carrier, can absolve his master, who is guilty of a most flagrant tort, from liability, by saying "I forgot." If we will pause a moment, it will be seen how far reaching and what a multitude of wrongs can be and will be covered securely by the diaphanous cloak of forgetfulness. An engineer has only to say, "I forgot to apply the air and put on brakes." A conductor has only to say, "I forgot to stop the train and let the passengers off." The surgeon has only to say, "I forgot to tie the artery, after amputating the limb." What wrongs will not be committed in the name of forgetfulness? What an overturning of the authorities in this state. We respectfully submit that the opinion of the court in this case is not in harmony with the prior decisions of this court. The court holds that appellant failed to establish the fact that the negligence of the telegraph company was the proximate cause of the child's death, and with this finding we are not complaining, but we earnestly and seriously contend that finding should not conclude the case in favor of appellee.

Harris & Potter and *Geo. H. Fearons,* for appellee.

No rule is better settled in this state than that applicable to suits for special damages alleged to be caused by the failure of a telegraph company to deliver or transmit a message or of a common carrier to transport goods. The rule is as follows: For a breach of contract to seasonably deliver a message, a telegraph company is liable for the damages which naturally, and in the usual course of things, flow from such breach. Other special damages are not recoverable unless the language of the message or extraneous information bring them within the contemplation of the parties. See: *Foster* v. *Y. & M. V. R. R. Co.,* —— So. 581; *Western Union Telegraph Co.* v. *Clifton,* 68 Miss. 307; *Jacob* v. *Postal Tel. Co.,* 67 Miss. 278; *Johnson* v. *Western Union Telegraph Co.,* 79 Miss. 58; *Western Union Tel. Co.* v. *Pallotta,* 81 Miss. 216; *Jennings* v. *Express Co.,* 86 Miss. 329; *Railroad Co.* v. *Ragsdale,* 46 Miss. 458. These cases all "hark back" to the leading case of *Hadley* v. *Baxendale,* 9 Exch. 341. Further, the special damages likely to arise must be made known to the telegraph company or common carrier at the time the contract was made. *Jennings* v. *Express Co., supra.* Further, the damages arising from the negligent delay in transportation by common carriers are generally and correctly treated as arising *ex contractu. Jennings* v. *Express Co., supra;* also, especially, *Western Union Tel. Co.* v. *Hogue,* 49 S. W. 924. An apt illustration of the rule, as applicable to the case at bar, will be found in the case of *Foster* v. *Y. & M. V. R. R. Co.,* 23 So. 581. The rule is as follows, as laid down in 37 Cyc., at page 1774: Where a message is sent for the sole purpose of requesting the addressee to meet the sender at a railroad depot, with or without a conveyance while the delay or non-delivery of the message may, and usually does, result in some disappointment and inconvenience, there is, as a rule, no actionable damage, except possibly the cost of obtaining a public conveyance.

Disappointment and inconvenience of this character are not generally regarded as anguish sufficient to justify a recovery of substantial damages even in a mental anguish state; nor is it ordinarily regarded as within the contemplation of the parties under these circumstances that the party will become sick or contract a cold, or nervous prostration, or otherwise be subject to physical suffering, although the company may from the terms of the message, or otherwise, be chargeable with notice of facts which will render it liable for special damages of this character. This general rule is amply supported by authorities and it seems settled that where the special circumstances (there were no special circumstances in the case at bar which rendered the walk necessary), are not made known to the company, as in the cases set forth above, and which are relied upon by counsel for the appellant, that the natural result of the failure to deliver a message of this character would be that the sender of the message would hire a public conveyance. The following cases support the rule as laid down in Cyc., and is the rule which we insist controls the case at bar. *Y. & M. V. R. R. Co.* v. *Foster* (Miss.), 23 So. 581; *Western Union Tel. Co.* v. *Powell,* (Texas) 118 S. W. 226; *Triggs* v. *Western Union Tel. Co.* (Georgia), 61 S. E. 855; *Western Union Tel. Co. Pratt,* 18 Okla. 274; *Kirby* v. *Western Union Tel. Co.,* 77 S. C. 580; *Hildreth* v. *Western Union Tel. Co.,* 56 Fla. 387; *Western Union Tel. Co.* v. *Bryant,* 46 N. E. 385; *Western Union Tel. Co.* v. *Regland,* 61 S. W. 421; *Western Union Tel. Co.* v. *Smith,* 13 S. W. 169; *Western Union Tel. Co.* v. *Campbell,* 81 S. W. 580; *Jones* v. *Western Union Tel. Co.,* 75 S. C. 280; *Todd* v. *Western Union Tel. Co.,* 77 S. C. 580; *Western Union Tel. Co.* v. *Hogue,* 79 Ark. 33; *McAllen* v. *Western Union Tel. Co.,* 7 S. W. 715; *Williams* v. *Western Union Tel. Co.,* 136 N. C. 82; *Stafford* v. *Western Union Tel. Co.,* 73 Fed. 273. All of these cases, as we have stated above, fully support the text quoted from

Cyc. and clearly and elaborately illustrate the rule that the special injury complained of must be such as would naturally and in the ordinary course of events follow from the negligence of the defendant, such as may be reasonably considered as within the contemplation of the parties at the time the contract was made. We do not see how the case at bar can be distinguished in principle from the case of the *Y. & M. V. R. R. Co.* v. *Foster,* 23 So. 581. In that case the telegram requested a party to meet the plaintiff, with a buggy, at the train. The telegram was not delivered. The plaintiff walked home through the hot sun and was made sick. WHITFIELD, J., delivered the opinion of the court and held that the plaintiff could not recover damages from voluntarily walking home in the hot sun; that this could not be held as the natural and proximate result of the failure to deliver the message.

In the case at bar, the message was to the plaintiff's father and as follows: "Meet me at depot with rig, as Ethel is sick." This message was not delivered and the plaintiff, without making any effort to get a conveyance, walked to his father's house, with the child, through the cold, and claims that that walk was the cause of the child's death. The fact that the child was sick cannot affect the principle. This circumstance made it all the more reasonable and natural to assume or contemplate that a conveyance would be obtained. It is shown in the case at bar that conveyances were available, there were two livery stables, but no effort was made by the plaintiff to obtain a vehicle and his walk through the cold, as Mrs. Foster's walk through the sun, was his voluntary act, and no more the natural result of the failure to deliver the message than Mrs. Foster's walk.

COOK, J., delivered the opinion of the court.

Appellant brought suit against the Western Union Telegraph Company for damages caused by its failure to

deliver a message sent by appellant to his father. Appellant resided at Morehead, and was the father of a girl about four years of age. This child had been ill for about ten days with diphtheria, and its parents determined to take the child to the home of appellant's father at Derma. The attending physician had not then diagnosed the trouble as diphtheria.

The morning appellant left Morehead with his child the following message was delivered by him to the agent of appellee for transmission to his father at Derma: "Meet me at the depot with rig, as Ethel is sick." Appellee's agent, to whom this message was delivered, was not the telegraph operator, and, being engaged about his business as station agent, forgot to give the message to the operator when he came in, and by reason of this negligence on his part the message was never sent. The record shows that Mr. Stark told the agent, when he delivered the message to him, that his daughter was "right sick."

It is the contention of appellant that, had the message been sent, his father would have met him at the depot at Derma with a hack, and the failure to send the message forced him to walk from the depot to his father's home, a distance of about a half mile, carrying his child in his arms, facing a damp, cold, north wind, and because of this walk, and consequent exposure, his child died within an hour after he reached Derma. The trial court instructed the jury to find a verdict for nominal charges in favor of plaintiff, appellant here. By this instruction the court, in effect, instructed the jury the evidence did not warrant a finding that the failure to send the message was the cause of the child's death.

The question for us to decide is about this: Could a reasonable and impartial jury believe from the evidence that the walk from the depot at Derma in the open air caused the death of the child? The trip from Morehead to Derma consumed something over seven hours, and

appellant was compelled to change cars twice during the trip—first at Mathiston and again at Houston. The morning he left home he carried the child in his arms to the depot, a distance of two hundred or three hundred yards. The day was inclement and cool, and it rained at intervals during the entire trip; but it was not raining while he was going from his home to the depot, nor did it rain while he was walking from the depot at Derma to his father's home. When the change of cars was made at Mathiston, appellant walked about two hundred yards with the child in his arms in the face of a brisk north wind. At Houston, where there was a second change of cars, appellant and the child rode in a "bus" about a half mile to the connecting line, where he had to wait for some time for a train to Derma. When Derma was reached, appellant was met by his father; but, as his father had not been advised of his coming, the meeting was accidental, and no conveyance had been provided.

Dr. Powell, the family physician, also happened to be at the depot, and at the request of appellant he made a cursory examination of the child, and saw that she needed attention. Her pulse was quick and breathing abnormal. Appellant requested Dr. Powell to come to the home of his father and take charge of the child. The doctor, within a short time, did visit the child, and found her in a critical condition. Up to this time no one suspected that the child was suffering with diphtheria. After examining the child, the physician went to his home near by to get an instrument with which to treat the child's throat, and when he got back death was in command. The child passed away before he could administer a heart stimulant.

It will be noted that Dr. Powell did not think a walk from the depot at Derma to the home of appellant's father would endanger the child's life. He saw and examined the little sufferer, and did not advise against the walk. Just here it may be said that Dr. Powell testified

that the child died from diphtheritic poison. She was beyond human aid when she reached Derma is the opinion of the physician on the ground. The disease had progressed too far to be then arrested. The evidence shows that diphtheria is a treacherous disease, and the rapid change from an apparently favorable condition to a speedy dissolution is not at all infrequent.

At the trial several physicians were called and gave their opinions from a hypothetical statement of the case. This evidence has been carefully analyzed, and, taken as a whole, it amounts to about this: That the exposure of the child to the cold wind while being carried from the depot to the home of appellant's father was detrimental, and probably hastened her death; but none of the experts said she would probably have survived if she had been carried from the depot in a hack.

This was all long-distance testimony, and the opinions that the last exposure hastened the death were doubtless predicated upon a theory embraced in the hypothetical question that the car in which the journey was terminated was warmer than the cars of the preceding trains, and, the child being overheated, exposure to the cold wind shocked her nervous system. This hypothesis was not supported by the evidence. True, appellant did say that the last car was warmer; but his opinion was based *solely* upon the fact that the child was sweating, and not from any difference in temperature which was perceptible to him. The mother said she did not discover any difference in the temperature.

This long, wearing trip all the doctors agreed was a tax upon the vitality of the child; and, indeed, any layman of ordinary intelligence knows this to be true. It is much more reasonable to assume that the sweating was due to the increased and increasing weakness of the child, caused by the poisons in her blood which ultimately paralyzed the heart; and yet the sweating was evidently stressed as the symptom of overheating.

As we see it, the evidence in this case does not establish the contention of appellant that the neglect to send the telegram was the proximate cause of the child's death, and we believe the trial court was right in limiting the recovery to nominal damages.

The pathetic death of the little girl and sympathy for her parents tug at the heart strings of the normal human being, and under this influence we are too prone to magnify the wrong of the corporation. Tested by the rules of law, which are based on reason and justice, we cannot reach the conclusion that the failure of the agent to deliver the message to the operator was reckless, willful, or intentional. He was a human being, and forgot. It is suggested that the sending of the message was a matter of life or death. We do not think that even the parents of the child had a suspicion that their child was seriously ill when they left Morehead; much less did they anticipate the death of the child.

Affirmed.

MARY J. SEUTTER *v.* BANK OF COMMERCE OF GULFPORT.

[65 South. 458.]

TRIAL. *Peremptory instruction. Taking case from the jury.*

A peremptory instruction should not be given, where there is a conflict in the material testimony of the case.

APPEAL from the circuit court of Harrison county.

HON. T. H. BARRETT, Judge.

Suit by Mary J. Seutter against the Bank of Commerce of Gulfport. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Leathers & Hardy, for appellant.

Wood & Taylor, for appellee.

REED, J., delivered the opinion of the court.

Appellant brought suit to recover the sum of two hundred and ninety dollars, the amount of a New York exchange sold to her by appellee. The payment of the exchange was stopped, and it was in possession of appellant on the trial of the case. Appellee pleaded the general issue and gave notice thereunder. In the notice it was claimed that the amount due appellant on the exchange had been paid and settled for in a general settlement between the parties. After appellant had introduced her evidence, the court sustained a motion to exclude the testimony, and thereupon granted a peremptory instruction to find for appellee.

The exchange held by appellant was properly put in evidence. Mr. Seutter, husband of appellant, and the only witness who gave testimony in reference to the exchange, testified that appellee had not paid his wife the amount owing therefor. We do not find in his testimony sufficient evidence to prove the defense of appellee that the exchange had been paid in the general settlement. The only other witness who testified could not say that the amount owing for the exchange by the bank was included in the transaction of the general settlement between the parties. We believe that the testimony introduced by appellant was sufficient to put the appellee to proof, and that the court erred in granting the peremptory instruction.

Reversed and remanded.

PRISCILLA BURTON v. J. F. BUTTLER.

[65 South. 459.]

EJECTMENT. *Boundaries. Survey. Accuracy.*

Where in an action of ejectment, plaintiff relied on a survey to establish the dividing line, which was the matter in controversy between the parties in the case, it does not appear from the testimony of the surveyor, that he located an established corner or monument of the original survey made by the United States Surveyor as a starting point in his survey. It cannot be said that he had a sufficiently established corner or place from which to run his lines, and a line thus run is not sufficiently certain and accurate as to enable a party relying thereon to maintain ejectment.

APPEAL from the circuit court of Marshall county.

HON. H. K. MAHON, Judge.

Suit in ejectment by J. F. Buttler against Mrs. Priscilla Burton. From a judgment for plaintiff, defendant appeals.

Appellant and appellee jointly inherited a section of land. Appellant inherited the east one-half and appellee the west one-half. The original survey of this section was made in 1841, but the government marks seem to have been destroyed. In 1883 a surveyor ran a dividing line between the land of appellant and appellee, and that boundary seems to have been accepted as the true boundary by the parties from whom appellant and appellee inherited. In 1911 appellee had another surveyor to run a line between his land and that of appellant, and there was a variation between that line and the line run in 1883, and appellee brought an ejectment suit for the possession of a strip of land claimed by appellant. Appellant claims that this last survey is not accurate, and the testimony shows that in making said survey the surveyor did not locate the government

markers as a starting point. The case was submitted to a jury under instructions, and a verdict was returned in favor of appellee.

Lester G. Fant and *Mayes & Mayes,* for appellant.

Green & Green and *Smith & Totten,* for appellee.

REED, J., delivered the opinion of the court.

In a trial of his action of ejectment, appellee relied on a survey to establish the dividing line which is the matter in controversy between the parties in the case. From the testimony of the surveyor, it does not appear that he located an established corner or monument of the original survey made by the United States surveyor as a starting point in his survey. It cannot be said that he had a sufficiently established corner or place from which to run his lines. The line, therefore, run by him was not with such degree of certainty and accuracy as to constitute it as the true and correct dividing line between the properties of appellant and appellee. *Newman* v. *Foster,* 3 How. 383, 34 Am. Dec. 98; *May* v. *Baskin,* 12 Smedes & M. 428; *Bonney* v. *McLeod,* 38 Miss. 393; *Reinert* v. *Brunt,* 42 Kan. 43, 21 Pac. 807.

Reversed and remanded.

PRETONIA LEONARD *v.* H. WESTON LUMBER CO.

[65 South. 459.]

ADOPTION. *Proceedings. Decree. Rev. Code* 1871, *section* 525.

Where a petitioner proceeding under Revised Code 1871, section 525, which provides that the prayer of a petition for adoption may be granted in whole or in part, filed a petition alleging that the adopting parent intended to make the child his sole heir, but the prayer of the petition did not contain such a provision,

and the order of adoption followed the prayer and provided only that the child be adopted, and that the name be changed, in such case the judgment did not vest in the child the right of heirship in the estate of the adopting parent.

APPEAL from the chancery court of Hancock county.

HON. J. M. STEVENS, Chancellor.

Suit by Pretonia Leonard against the H. Weston Lumber Company. From a judgment for the defendant, the plaintiff appeals.

The facts are fully stated in the opinion of the court.

W. W. & J. E. Stockstill and *W. J. Gex,* for appellant.

McDonald & Marshall, for appellee.

COOK, J., delivered the opinion of the court.

The decision of a single question is determinative of all questions involved in this suit.

The rights of appellant are measured by and depend upon a judgment rendered by the circuit court of Hancock county, on the 7th day of May, 1872. The original proceedings were begun by a petition, which is in the following words, viz.:

"The State of Mississippi, Hancock County.

"To the Honorable G. C. Chandler, Judge of the First Judicial Circuit Court District of said state:

"This petition of Sylvester Miller, Mary Jane Miller, and George W. Holleman would respectfully show unto your honor that of your petitioners Sylvester is the father and Mary Jane Miller is the mother of Pretronia Miller, and reside in said county of Hancock, said Pretronia being about the age of four; that in consideration of the petition of the petitioner G. W. Holleman to have their said child adopted to the said Holleman they are willing and so petition your honor that said Holleman adopt said child, and that her name be changed from that of Pretronia Miller to that of Pretro-

nia Holleman, and your petitioner Geo. W. Holleman would show that he is desirous of adopting as his child the said Pretronia Miller, and pray your honor to change the name of the said Pretronia Miller to that of Pretronia Holleman.

"Your petitioner further shows to your honor, it is his intention and desire to make the said Pretronia his sole heir; that he has no children of his own; that said Pretronia is now living with your petitioner, and your petitioner and his wife are much devoted to the said child, and said child is much devoted to said petitioner and his wife. Your petitioners, Geo. W. Holleman, Sylvester Miller, and Mary Jane Miller, therefore pray that the said Geo. W. Holleman be permitted to adopt said Pretronia, and that her name be changed to that of Pretronia Holleman, and as in duty bound your petitioner will ever pray, etc.

"[Signed] G. W. HOLLEMAN,
"SYLVESTER MILLER,
"MARY JANE MILLER.

"J. B. DEASON, Attorney for Petitioners."

In response to the foregoing petition this order was made upon the minutes of the court, viz.:

"State of Mississippi, Hancock County.

"Circuit Court, Said County, May Term, A. D. 1872.

"G. W. Holleman, Sylvester Miller, Mary Jane Miller—
Ex parte.

"This day this cause coming on for hearing upon the petition of G. W. Holleman, Sylvester Miller, and Mary Jane Miller for the adoption by the said George W. Holleman of the child, Pretronia Miller, and to change the name of the said child, Pretronia Miller, to that of Pretronia Holleman, and the court being satisfied that the allegations of said petition are true, and that the interest and welfare of said infant will be promoted by such an adoption, it is therefore ordered by the court that said George W. Holleman adopt said child; that

her name be changed from that of Pretronia Miller to that of Pretronia Holleman, and that said child hereafter be called by that name.

"Ordered, and adjudged this the 7th day of May, A. D. 1872."

Appellant by her bill of complaint in this suit claims to be heir at law of G. W. Holleman, deceased, by whom she was adopted in the foregoing proceedings.

It will be observed that in the petition filed by the mother and father of appellant and George W. Holleman, Mr. Holleman expressed a desire to adopt Pretronia Miller (appellant), and asked that her name be changed to Pretronia Holleman. He further said that it was his intention and desire to make Pretronia his sole heir. It will be also observed that the prayer of the petition does not ask the court to enter a judgment making Pretronia his heir.

The judgment of the court follows the prayer of the petition that:

"George W. Holleman adopt said child; that her name be changed from that of Pretronia Miller to that of Pretronia Holleman, and that said child be called by that name."

The adoption proceedings were had under section 525, Revised Code of 1871, and the court granted the prayer of the petitioner.

The court did not decree that the child should become the heir of the adopted parent, nor did the petitioner request the court to so decree. It is futile to conjecture why this was not made a condition to the adoption. We know of no rule by which we can, by construction, work into the decree something which plainly it does not mention. By the statute the prayer of the petition may be granted in whole or in part, but in this case there was no prayer that the adopted child be made the heir at law of the foster parent.

Affirmed.

J. H. NEWTON *v.* J. H. LONG.

[65 South. 460.]

LANDLORD AND TENANT. *Leases. Turpentine leases. Nature of property. Actions. Evidence.*

A license or lease to go upon land and extract rosin or turpentine from standing trees is not any interest in the land as land but such a lease is personal property and a conveyance of the same need not be in writing.

APPEAL from the chancery court of Hancock county.

HON. T. A. WOOD, Chancellor.

Suit by J. H. Long, against J. H. Newton. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

McDonald & Marshall, for appellant.

The estate embraced in the lease from Hode to Leatherbury, which passed on down to the Standard Naval Stores Company, is not in existence and was absorbed before the execution of the lease of Hode to Newton, appellant, authorizing him to back-box or cup the timber on said land. Pine timber is round before it has been boxed or worked for turpentine. When boxed, according to the custom of the business, all of the trees that are suitable for boxing are then boxed and after the working for three years—if the lease is for three years—there is no such thing, under the custom of the business as going back and cutting other boxes or hanging cups on the other side. A few years after timber has been boxed for turpentine, cups and boxes can be put on the opposite side of the timber that has formerly been boxed. This is an estate or an interest that belongs to the owner of the timber and which would not have passed under the original lease. A lease of round timber when he

works it under a lease for the length of time authorized, has no right—nor does he attempt to do so under the custom of the business—to return to the land and attempt to back-box or back-cup it, or to box or cup round timber overlooked on the original working. It is admitted that John C. Orrell entered on the lands in controversy in February, 1903, and boxed and worked for turpentine, the pine timber thereof for three years after, being the years 1903, 1904, and 1905. The contention is therefore, that whether he had a right so to do or whether he was a trespasser he absolutely absorbed, consumed and put out of existence the property rights which had been conveyed to the Standard Naval Stores Company and Levi Anderson, which was to work this timber, being round timber, for three years. After a few years, when working round timber ceases, a few boxes and many cups can be placed on the opposite side of the tree which is in a state for "back-boxing" and which is a right that does not exist in the lessee of round timber but it is what remains after he has exercised his rights. For the above reasons we submit that the decree of the chancellor was erroneous and should be reversed.

W. J. Gex, for appellee.

In the case of *Hancock County* v. *Imperial Naval Stores Co.*, 93 Miss. 822, this court held that a turpentine lease was not an interest in land. After stating the facts of the case, which was based upon a turpentine lease practically identical with the one at issue, and dealing with the proposition as to whether a turpentine lease was an interest in land, this court, through Chief Justice WHITFIELD, said: "We conclude, therefore, that whatever this instrument may be called technically, whether a lease or a license, undoubtedly what it grants is not any interest in the land as land, but a mere irrevocable right, during the life of the contract, to enter upon the land and take from the pine trees the crude resin or turpentine."

This would seem then to dispose of the first contention raised by the appellant.

REED, J., delivered the opinion of the court.

Appellee obtained a decree against appellant for eighty-seven dollars and eighty-seven cents, the value of turpentine taken by appellant from trees included in a lease held by appellee.

Appellant contends that appellee had no right to recover, because the lease in question was not owned by him; it having been included in a sale of leases by a former owner to the Standard Naval Stores Company, a corporation, evidenced by an instrument of writing duly executed and recorded, and it never having been conveyed in writing by that company. It is in testimony that the former owner, Levi Anderson, did not intend to convey the lease to the Standard Naval Stores Company; that it was never paid for, nor claimed, nor worked by the company; and that it was included in the deed by a mistake.

It has been held in the case of *Hancock County* v. *Imperial Naval Stores Co.*, 93 Miss. 822, 47 So. 177, 17 L. R. A. (N. S.) 693, 136 Am. St. Rep. 136, that a license or lease to go upon land and extract resin or turpentine from standing trees is not any interest in the land as land, and that the instrument granting the right does not pass such interest. In *Jones* v. *Adams*, 61 So. 420, it was held that a turpentine lease is personal property.

As the lease in this case is personal property, it was not necessary for it to have been reconveyed to Mr. Anderson by the Naval Stores Company in writing. In the instrument of writing purporting to transfer the lease in question the value of the lease is shown to be less than fifty dollars in amount; for the lease and two other leases are together listed at a total valuation of fifty dollars.

The refusal and failure by the Standard Naval Stores Company to pay for, claim, work, or in any way use the

lease, or assert any right thereto, manifested its purpose not to recognize any ownership through the conveyance, nor any title which might be vested thereby, and further shows its purpose to release and return to Mr. Anderson any interest which may have passed to the company by the conveyance. The decision by the chancellor that the inclusion of the lease in the written transfer by Mr. Anderson to the Standard Naval Stores Company was a mistake, and that no title thereto passed, is sustained by evidence.

There is sufficient evidence to warrant the chancellor's holding that appellant had no right to "cup" or "back-box" the trees by reason of the lease made to him subsequent to the original lease which passed to appellee.

Affirmed.

FLOYD ROBINSON, BOARD COM'RS *et al.* *v.* BOARD OF SUPERVISORS OF ITAWAMBA COUNTY.

[65 South. 461-62 South. 3.]

BOARD OF SUPERVISORS. *Appeal from decisions. Limitation.*

Where appellant had lost by limitation the right of appeal to the circuit court, from an order of the board of supervisors, they could not by again going before the board with practically the same petition and for the same purpose, and having entered again the former judgment, the right of appeal from which had been lost by limitation, obtain again a right of appeal.

APPEAL from the circuit court of Itawamba county.

HON. CLAUDE CLAYTON, Judge.

Petition by Floyd Robinson and others, road commissioners, to the board of supervisors of Itawamba county, for an order for publication of the sales of bonds, and

from an order of the circuit court affirming an order of the board denying the order, petitioners appeal.

The facts are fully stated in the opinion of the court.

Wiley H. Clifton, for appellant.

W. D. & J. R. Anderson, for appellee.

REED, J., delivered the opinion of the court.

This is an appeal by the road commissioners of the Fourth supervisor's district of Itawamba county from the judgment of the circuit court affirming an order of the board of supervisors of the county. In the order affirmed, the board refused to make any further order in the matter of the sale and issuance of bonds of the road district. This matter was before us on a former appeal. *Robinson* v. *Board of Supervisors,* 62 So. 3. The opinion delivered by us on that hearing contains a statement of the case as far as it had progressed at that time. It was therein held that mandamus would not lie to compel the board of supervisors to issue and sell the road bonds as desired by the commissioners; that the commissioners had the right of appeal, provided in section 80 of the Code of 1906, to the circuit court, from the decision of the supervisors. Shortly after the decision of the case on the former appeal, appellants filed with the board of supervisors a supplemental report and petition. In this they reviewed all of the proceedings in the matter before the supervisors up to and including the final order, which was the foundation for the mandamus suit, and prayed: (1) For another order for publication of the sale of bonds; (2) for allowance to commissioners and surveyors; and (3) for the fixing of the amount of the bonds to be offered for sale at either the sum of nineteen thousand five hundred dollars or twenty-one thousand dollars. In a prior order of the board the amount of the bonds had been fixed at twenty-one thousand dollars. In the order of the board made at

lease, or assert any right thereto, manifested its purpose not to recognize any ownership through the conveyance, nor any title which might be vested thereby, and further shows its purpose to release and return to Mr. Anderson any interest which may have passed to the company by the conveyance. The decision by the chancellor that the inclusion of the lease in the written transfer by Mr. Anderson to the Standard Naval Stores Company was a mistake, and that no title thereto passed, is sustained by evidence.

There is sufficient evidence to warrant the chancellor's holding that appellant had no right to "cup" or "back-box" the trees by reason of the lease made to him subsequent to the original lease which passed to appellee.

Affirmed.

FLOYD ROBINSON, BOARD COM'RS *et al.* *v.* BOARD OF SUPERVISORS OF ITAWAMBA COUNTY.

[65 South. 461-62 South. 3.]

BOARD OF SUPERVISORS. *Appeal from decisions. Limitation.*

Where appellant had lost by limitation the right of appeal to the circuit court, from an order of the board of supervisors, they could not by again going before the board with practically the same petition and for the same purpose, and having entered again the former judgment, the right of appeal from which had been lost by limitation, obtain again a right of appeal.

APPEAL from the circuit court of Itawamba county.

HON. CLAUDE CLAYTON, Judge.

Petition by Floyd Robinson and others, road commissioners, to the board of supervisors of Itawamba county, for an order for publication of the sales of bonds, and

from an order of the circuit court affirming an order of the board denying the order, petitioners appeal.

The facts are fully stated in the opinion of the court.

Wiley H. Clifton, for appellant.

W. D. & J. R. Anderson, for appellee.

REED, J., delivered the opinion of the court.

This is an appeal by the road commissioners of the Fourth supervisor's district of Itawamba county from the judgment of the circuit court affirming an order of the board of supervisors of the county. In the order affirmed, the board refused to make any further order in the matter of the sale and issuance of bonds of the road district. This matter was before us on a former appeal. *Robinson* v. *Board of Supervisors,* 62 So. 3. The opinion delivered by us on that hearing contains a statement of the case as far as it had progressed at that time. It was therein held that mandamus would not lie to compel the board of supervisors to issue and sell the road bonds as desired by the commissioners; that the commissioners had the right of appeal, provided in section 80 of the Code of 1906, to the circuit court, from the decision of the supervisors. Shortly after the decision of the case on the former appeal, appellants filed with the board of supervisors a supplemental report and petition. In this they reviewed all of the proceedings in the matter before the supervisors up to and including the final order, which was the foundation for the mandamus suit, and prayed: (1) For another order for publication of the sale of bonds; (2) for allowance to commissioners and surveyors; and (3) for the fixing of the amount of the bonds to be offered for sale at either the sum of nineteen thousand five hundred dollars or twenty-one thousand dollars. In a prior order of the board the amount of the bonds had been fixed at twenty-one thousand dollars. In the order of the board made at

the February term, 1913, in response to a second supplemental report and petition, asking the board to amend and modify an order made at the November meeting, 1911, the board denied the amendments requested, and refused to make any further order in the case. As stated above, no appeal was taken to the circuit court from this action by the board, but mandamus was invoked. The petition filed by the commissioners after the former appeal was decided by this court, and which petition was considered at the August meeting, 1913, was another supplemental report and petition, bringing no new matter before the board, and asking, practically, for the same action by the board as that prayed for in the petition, which was acted on at the February meeting.

We quote as follows from the order of the board made at the August meeting, 1913, in response to the last supplemental report and petition:

"This cause came on for hearing on the petition of Floyd Robinson *et al.*, road commissioners of the Fourth district of the said county, asking the board to make an order for the issuance and sale of the bonds of the said district with which to build roads. And it appearing to the board that all matters and things involved in this cause and said petitions were settled and determined by this board by an order entered in this cause at its February meeting, 1913, on the fourth day of the said month, which order is recorded in the minute book 1211 page 45 and 46: It is therefore ordered and adjudged by the board that no further order be made in this cause; it being the judgment of the board that it ought not to be done, and cannot be done under the law."

From this order an appeal was taken to the circuit court where the case was heard and determined on bill of exceptions, as provided for in the statute.

Appellants had lost by limitation the right of appeal from the order made at the February term, 1913, of the

board of supervisors. The order made at the August term, 1913, was in all respects the same as the February order. Appellants could not, by again going before the board with practically the same petition and for the same purpose, and having entered again the former judgment the right of appeal from which had been lost by limitation, obtain again a right of appeal. Appellants are barred of the right of appeal in this case.

Affirmed.

YAZOO & M. V. R. R. CO. v. G. Y. CRAWFORD.

[65 South. 462.]

1. CARRIERS. *Carriage of goods. Duties. Monopolies. Contracts in restraint of trade. Validity. Loading privileges. Loading facilities. Action. Recovery.*

   There is no legal obligation resting upon railroads as common carriers to furnish their cars, engines, and crews to individuals carrying on a log loading business, or to receive logs to be loaded on its cars along the right of way between stations.

2. MONOPOLIES. *Contracts in restraint of trade. Validity.*

   Since a railroad company is not bound to furnish facilities for the loading of logs between stations, it may, where it had permitted the loading of logs at such points, undertake the business itself, to the exclusion of all others and having this right it could employ another to do that which it could itself lawfully do, and such would not constitute an illegal monopoly.

3. SAME.

   Our anti-trust statute was only intended to embrace within its provisions those contracts in restraint of trade, which were invalid as against public policy before the enactment of the statute.

4. RAILROADS. *Licenses for loading privileges.*

   Because a railroad company had for a long time allowed private individuals the privilege of loading at points between its stations and plaintiff had built up a profitable business under that arrangement, does not give plaintiff any right to insist that the

privilege be continued and he cannot object that the railroad company thereafter gave another the exclusive license to load logs between stations, since a repetition of favors for accommodation cannot constitute a foundation for a valid claim to their enjoyment as a right.

5. CARRIERS. *Carriage of goods. Loading facilities. Principal and agent.*

Where a common carrier of logs gave another the exclusive privilege to load logs at all points on its line, such third person became thereby the carrier's agent, and the carrier is liable to a shipper of logs for the loader's failure to promptly load his logs.

6. CARRIAGE OF GOODS. *Actions. Recovery.*

A railroad cannot hold itself out as a common carrier of logs, and refuse the shipper the right to load his own logs and escape the responsibility of a wrongful performance of duty by an agency employed by it to discharge this function. It must either provide for loading logs itself, or it must allow the shipper to load them, and furnish the facilities for that purpose and this objection is not affected in any way by the fact that the railroad company has published its tariff according to law, or that it was necessary for the plaintiff as a condition to maintaining his action to go before either the Mississippi Railroad Commission or the Interstate Commerce Commission to correct his grievance.

APPEAL from the circuit court of Bolivar county.

HON. SAM C. COOK, Judge.

Suit by G. Y. Crawford against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Chas. N. Burch, H. D. Minor, Frank A. Montgomery and *Mayes & Mayes,* for appellent.

T. S. Owen, Belford & Allen and *Sillers & Sillers,* for appellee.

HARRIS, Special Judge, delivered the opinion of the court.

This is an appeal from a judgment rendered in the circuit court of Bolivar county against the railroad com-

pany in favor of G. Y. Crawford, from which the railroad company appeals.

The facts which led to the institution of the suit are substantially as follows: Owing to the peculiar topography of the country, and the difficulties attendant upon carrying logs for shipment to the established stations of the railroad company, the railroad company for some years undertook to receive logs for shipment at points along its right of way between stations for the mutual convenience of itself and shippers of logs, requiring the shippers to load their logs, but extended to persons owning log loading machinery the privilege of loading logs at any point along the road where the same might be accumulated, the company furnishing flat cars, engines, and crews for moving the logs when loaded, and also for moving the log loading machinery from place to place as it became necessary for the loading of logs, and allowed the owners of log loading machinery, not only to load logs for their own mills where they were owners of mills, but also to load logs for other parties owning mills, who did not own log loading machinery, and to charge the parties served for the loading. The log loader is a device which is put upon a flat car, and, by means of a derrick and other appliances, the logs are lifted from the ground and deposited upon the flat cars. This privilege and arrangement was confined entirely to one portion of the railroad company's line, and was altogether exceptional and due to the peculiar conditions existing, and was intended by the railroad company to foster the log-shipping industry, and to facilitate shippers in getting their logs to market or to their mills.

The plaintiff was engaged in the manufacture of staves, and had two mills, one at Boyle and one at Dean on the line of the defendant's road, and he was also the owner of a log loader, and had been for some years engaged in loading his own logs for his own mills, and also in the independent business of a log loader, loading logs

for other shippers who did not own log loaders. After trying this arrangement for several years, the railroad company concluded that it was altogether unsatisfactory, that it led to confusion and interfered more or less with the general operation and movement of trains on its road in its general business, and also in the handling of logs, as there were several other parties besides the plaintiff engaged in the business of log loading, using the trains, engines, crews, and tracks of the railroad company. In order to systematize the business and render it more satisfactory to the shippers of logs and the owners of mills, and to prevent confusion and delays, arising from allowing a number of independent owners of log loading machinery on the road at the same time, and some at the same place, the railroad company had a conference with the mill owners who were served from this district, both in Memphis and in Mississippi, and also with the shippers of logs, and it was concluded that it was best to abolish the practice of extending this privilege indiscriminately to a number of owners of log loaders, and to place the loading under one responsible head, and as a result of this conference what is known as the Valley Log Loading Company was organized. This log loading company was not a shipper of logs nor interested in mills, but was simply organized as a log loading agency, and the railroad company's contracts with it gave it the exclusive right to load all logs along the line of its road. It seems that this Valley Log Loading Company divided the territory into certain districts, and employed log loaders to load logs in particular districts, so as to prevent conflicts and confusion. The plaintiff made a contract with the Valley Log Loading Company under which he operated for some seven or eight months, hauling logs to his own mills, and also loading logs for other persons, at a profit, paying the Valley Log Loading Company twenty-five cents per one thousand for all logs hauled for other persons, but paying nothing for logs

loaded for his own mills. He terminated this contract and brought suit against the railroad company. There were two declarations filed, an original and an amended declaration. Each declaration contains two counts. These declarations are very long; but the ground of complaint in each is practically the same, the basis of the action being the claim of the plaintiff that the contract made by the railroad company with the Valley Log Loading Company was illegal, as being unjustly discriminatory against him, in that it denied him the right to load logs, and extended it to the Valley Log Loading Company, and that it was an illegal restraint of trade, and created an illegal monopoly.

In the first count of each declaration, the plaintiff claims that he had established an independent log loading business profitable to him, and that by reason of the alleged illegal contract his business had been destroyed; that he had incurred considerable expense; that he lost the benefit of certain contracts for loading logs which were then existing, and also the opportunity of making other contracts. In other words, that he had established a profitable loading business which had been destroyed by this alleged illegal contract; the claim being that he had established this business, relying upon an alleged established custom of the railroad company which had the force of law, and that the railroad company was liable to him in damages for destroying his business.

In the second count of each declaration, the claim set up is that the plaintiff was damaged in his relation as shipper of logs and a manufacturer of staves, claiming that the railroad company did not furnish facilities at its stations or elsewhere reasonably sufficient to handle the logs intended for shipment; that the Valley Log Loading Company was not only inadequately equipped but would not load logs for the plaintiff when demanded; and that, by reason of that, the plaintiff's business as a stave manufacturer was so greatly crippled that he had to close his

two mills at Boyle and Dean and move them to other localities where timber was more convenient.

We think this statement will be sufficient for a practical understanding of the decision of the court.

It will be seen that the plaintiff is claiming damages of the railroad company in two aspects, one for destroying his business as an independent log loader, and the other in destroying his business and damaging him as a shipper and a mill owner; and one of the underlying questions is as to the validity of the contract made with the railroad company and the Valley Log Loading Company.

The railroad company set up as a special defense in this case the facts which we have set forth, claiming that it derived no profit whatever under this contract which it had made with the Valley Log Loading Company; that the contract was not intended to favor the Valley Log Loading Company or to discriminate unlawfully against the plaintiff or any one else, but was rendered necessary by the exigencies of the case—what the railroad company considered as being in the interest of the public, that is to say, the mill owners, and log owners, and log shippers, and the general public as passengers and shippers of freight. It was claimed that it was under no legal obligation to furnish the plaintiff or any one else with a train of cars for loading logs anywhere, and particularly at places between stations, and that in doing this it was acting purely in a private capacity, and as a private carrier, and not as a common carrier, and that it had a right to terminate this arrangement or adjust it, or to make any other arrangement that it considered best for the interest of all parties concerned, it not being the purpose of the railroad company under this contract to give any undue preference to any competitor of the plaintiff; that the Valley Log Loading Company was not in existence, and not a competitor of the plaintiff, but was organized solely for the purpose of loading logs; that the

arrangement was not in any sense in restraint of trade, but intended to foster and promote the interest of the shippers; that it was not an illegal monopoly, but was the doing of an act which the railroad company had a legal right to do.

It is well enough to say here that it is admitted, both in the argument and in the briefs, that the railroad company was under no legal obligation to make the arrangement which had theretofore existed, and that it had a right to abolish it at any time, and that the plaintiff would have had no right of action; but it is claimed that, as the railroad company did not entirely abolish its arrangement, but had made a contract with the Valley Log Loading Company to carry on a log loading business, its contract, being exclusive, was illegal as extending a right to the Valley Log Loading Company which it denied to the plaintiff and all other parties doing a loading business.

We are of opinion that the contract made with the Valley Log Loading Company under the circumstances was not an illegal contract. The arrangement which the railroad company had made with reference to the loading of logs and furnishing to parties its cars, engines, and crews was not in any sense a function or duty required of the company in its capacity as a common carrier. There was no legal obligation resting upon the railroad company to furnish its cars, engines, and crews to individuals carrying on a log loading business, or to receive logs to be loaded on its cars along the right of way between stations. The railroad company could itself have undertaken this to the exclusion of everybody else. This is not controverted. It would then monopolize the business in a sense, but not legally.

In the case of *Houck* v. *Wright*, 77 Miss. 483, 27 So. 617, this court says:

"The legislature, by the chapter on trusts and combines, did not intend to debar a person from conducting his own private business according to his own judgment."

It was not the purpose to limit either the term used in the Constitution or in the statute by any narrow definition, but leave it to the courts to look beneath the surface and, from the methods employed in the conduct of his business, to determine whether the association or combine in question, no matter what its particular form should chance to be, or what might be its constituent elements, is taking advantage of the public in an unlawful way. This case and this extract from it were cited with approval of this court in the case of the *Telephone & Telegraph Co.* v. *State,* 100 Miss. 116, 54 So. 670, 39 L. R. A. (N. S.) 277.

This court further held in the case of *Telephone Company* v. *State, supra,* that our anti-trust statute was only intended to embrace within its provisions those contracts in restraint of trade, those monopolies and attempts to monopolize, which were invalid as against public policy before the enactment of the statute; that a contract in reasonable restraint of trade was valid before the enactment of the statute, where its design and purpose was not to create a monopoly, and that such contract is valid now, where it is only such as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. See, also, *Railroad Co.* v. *Searles,* 85 Miss. 520, 37 So. 939, 68 L. R. A. 715; *Sivley* v. *Cramer,* 61 So. 653.

In the case of *Telephone Company* v. *State, supra,* it was contended on the part of the state that a contract made between the Cumberland Telephone & Telegraph Company and the Oxford Telephone Company, a local company, containing the provision that the local company would not extend its line so as to conflict with the business or interest of the Cumberland Telephone & Telegraph Company, and would not make any connection with any other telephone line, and would not extend its lines outside of Lafayette county, and give its long distance

business *exclusively* to the Cumberland Company, was not an illegal contract, and that it was a contract made in good faith on the part of the companies for the purpose of protection to their interests, and in the interest of the public, and that this contract improved the efficiency of both systems and made both more valuable to the public, as well as to the owners. In the case at bar the reasons for upholding the contract as valid are, if anything, stronger than in the telephone case, for the reason that the railroad company has the right, as was admitted, and as must be admitted, at any time to abolish the whole arrangement and assume itself the duty of loading logs to the exclusion of every one else, if it saw fit to do so; and if it has the right to do this, it certainly had the right to make the contract with another corporation or individual to perform that service for it. See *Covington Stock Yard Company* v. *Keith,* 139 U. S. 128, 11 Sup. Ct. 469, 35 L. Ed. 73. In that case the railroad company had a contract with the stockyard company to furnish facilities for the loading and unloading of live stock. The court said:

"It did not concern them (the shipper) whether the railroad company itself maintained stockyards or employed another company or corporation to supply the facilities for receiving and delivering the live stock it was under obligation to furnish."

In other words, it is not unlawful for the railroad company to employ another to do that which it could itself lawfully do. That is what was done in the case at bar. It was for the railroad company to determine whether the existing arrangement was inconvenient, confusing, or dangerous—that was a matter of its own concern. It could have abolished the arrangement, without assigning any reason for it, if it saw fit to do so, as it was under no legal obligation to continue it.

It is claimed, however, by the plaintiff that he had built up a business upon the faith of the arrangement existing,

and that the taking from him the right to do a log loading business and not furnishing him with facilities for that purpose had destroyed his business. We think the plaintiff cannot claim that he had established a business of a permanent nature, based upon the doing by the railroad company of an act which it was under no legal obligation to perform, and whatever he did in this regard must have been done subject to the right of the railroad company to abolish the arrangement at any time. We do not see that there is anything in the record which would support the claim of the plaintiff that there was an established custom which had ripened into the force of law.

In the case of *V. & M. Railroad Company* v. *Dixon,* 61 Miss. 119, the court held that the fact that the railroad company had for thirty years maintained and repaired a stock gap where its road entered the plaintiff's field did not impose upon the railroad company any legal obligation to continue to repair and maintain the stock gap, and that it was not liable for having neglected repairing it, although by reason of such neglect, cattle had entered plaintiff's field and had destroyed his crop. The court, through Justice CAMPBELL, said:

"A repetition of favors for accommodation cannot constitute a foundation for a valid claim to their enjoyment as a right. The course of dealing between the parties about the cattle gaps did not affect the question of right or liability in respect to them. . . . The law imputes to him a knowledge of the nonliability of the company for the maintenance of the cattle gaps, and it is his misfortune to have relied on the appellant to render him a service for which he had no legal claim on it. . . . Unless the appellant was legally bound to repair the (cattle) gap, it was not liable for not doing it. It certainly was not originally bound to construct these appliances for the benefit of the appellee."

We cannot see why the principle announced in this case does not apply here, so we hold that the contract

in this case was not illegal, and that the railroad company had a legal right to abolish the course of dealing, and therefore the plaintiff could not recover for the interruption of his business as a loader of logs, and the court below erred in allowing him to recover damages under the first count of the declaration.

It will be seen that the relation which the plaintiff bore to the railroad company as a loader of logs for a profit and that of a mill owner and shipper of logs are quite distinct. While we hold that the contract is valid, yet as a common carrier of logs, which the railroad company certainly was, it owed to the plaintiff, as a shipper, certain duties which it was legally bound to perform. The railroad company could have abolished the practice of receiving logs for shipment between stations. We will not go so far as to say that it might have, owing to the exceptional character of the commodity, required the owners and shippers to load their logs at stations; but the railroad company would have been bound by law to have furnished stations, at least, facilities for loading logs if it undertook to receive logs for shipment. In this case the complaint is that the railroad company did not furnish any facilities directly for the loading of logs; but it did contract with an agency, the Valley Log Loading Company, to load the logs between stations and elsewhere, and we hold that the Valley Log Loading Company was merely an agency of the railroad company for the performance of whose duties the railroad company was responsible. The railroad company could not say to the shipper:

"You shall not load logs for yourself, and we will not furnish any facilities for loading logs although we hold ourselves out as carriers of logs."

It must either load the logs itself or furnish proper facilities to the owners of logs for shipment. The plaintiff had a right to demand this of the railroad company. It was conceded on the argument that the rail-

road company would be responsible for any dereliction of duty on the part of the Valley Log Loading Company, and aside from this admission, we think the law would impose this liability upon the railroad company and treat the log loading company as an agent of the railroad company in this respect, and treat the railroad company as having assumed the duty of loading logs.

Under the second count of the declaration, the plaintiff claims that no facilities were offered to him at stations, and that the Valley Log Loading Company did not load his logs, that is to say, the logs intended for his business as a shipper and as a millman, when he called upon it so to do, at least they were negligent in this regard, and that he was unable to carry on his business at Dean and Boyle profitably, and to fill contracts for staves which he had made, or to make other contracts.

In the case of *Covington Stock Yard Co.* v. *Keith, supra,* the supreme court of the United States says that, while it was held that the railroad company had a right to make an exclusive contract with the Covington Stock Yard Company, the contract providing that it would make the yards of the stockyard company its depot for delivering all live stock during the term of the contract, and not to build or allow to be built on its right of way any other depot or yards for the reception of live stock, yet the stockyards company was bound to accord to Keith all privileges that he was entitled to from its principal as a common carrier, and, as the common carrier did not offer to establish stockyards of its own, the court did not err in requiring the railroad company to receive and deliver live stock at the stockyard of the plaintiff. See, also, Hutchinson on Carriers (3d Ed.), sec. 509 *et seq.*

In the case at bar the railroad company adopted an agency for the loading of logs, it is a common carrier of logs, it denies to the plaintiff the right to load his own

logs, and, while it has a legal right to make the contract in question, it must see that the rights of the shipper, the plaintiff, are protected as fully as if the railroad company itself was undertaking to load logs for shipment directly. The plaintiff was entitled to recover any damage which he may have sustained as the proximate result of the failure of the log loading company to discharge this duty to him; and, for this reason, the court did not err in refusing to give a peremptory instruction asked by the railroad company under the state of the testimony in the record. The judgment of the court below must be reversed, because the court erred in allowing the plaintiff to recover damages on account of the loss of the log loading business; but the plaintiff will be entitled to recover such damages as he may be able to show by proper proof to have sustained in his capacity as shipper and millman. The railroad company must be treated in this case as having undertaken itself to load logs for shippers through an agency employed by it, that is, the Valley Log Loading Company. The plaintiff's right to recover damages, of course, will be determined by the ordinary rules of law applicable to such cases.

The railroad company cannot hold itself out as a common carrier of logs, and refuse the shipper the right to load his own logs and escape the responsibility of a wrongful performance of duty by an agency employed by it to discharge this function. It must either provide for loading logs itself, or it must allow the shipper to load them, and furnish the facilities for that purpose. We do not consider that this phase of the case is affected in any way whatever by the fact that the railroad company has published its tariffs according to law, or that it was necessary for the plaintiff as a condition to maintaining this action to go before either the Mississippi Railroad Commission or the Interstate Commerce Commission to correct his grievance. The duties which are

imposed upon the carrier here are the duties which the law imposes independently of the Interstate Commerce Commission and the Mississippi Railroad Commission, but arises from the nature of the functions performed by the railroad company and the duty which the law imposes upon it in this regard.

Reversed and remanded.

BOARD OF SUP'RS OF COVINGTON COUNTY *v.* CONNER LBR. CO.

[65 South. 466.]

1. TAXATION. *Assessment. Duty of board of supervisors. Change of valuation. Power of board of supervisors. Code* 1906, *sections* 4293-4298-4307.

It is the duty of the board of supervisors to see that all changes in assessments for taxes are entered on the roll.

2. TAXATION. *Assessment. Changes of valuation. Power of board of supervisors.*

The statute Code 1906, section 4293, fixes the first Monday in July as the time for the filing of the assessment roll made up by the assessor and authorized the board of supervisors to extend the time to the first Monday of August and no longer. Section 4297, Code 1906, requires the supervisors to hold a meeting on the first Monday of August to examine the assessment roll and determine all exceptions thereto and to sit from day to day until the same has been disposed of and all corrections made. Section 4298 provides that, if the assessor be given additional time, the board shall hold its meeting on the first Monday in September. Section 4307 requires the clerk to make two copies of each roll as examined and corrected, one to be transmitted to the auditor of public accounts and the other to the tax collector on or before the first Monday in October. Under these statutes where the board of supervisors failed to enter at their September meeting an increase in the assessment roll, and time of filing the rolls, having been extended, it cannot in the following October, increase an assessment, since its power being wholly statutory, it could not make a change after the time prescribed by the statutes.

APPEAL from the circuit court of Covington county.

HON. W. H. HUGHES, Judge.

The board of supervisors of Covington county raised the valuation upon the land of the Conner Lumber Company, which appealed to the circuit court. From a judgment of the circuit court, setting aside the order of increase, the board of supervisors appeal.

The facts are fully stated in the opinion of the court.

E. L. Dent and *Geo. H. Ethridge,* for appellant.

The board having determined, in a legal manner, to raise the assessment and having evidenced their intention by an entry on the minutes, which is the only proper way for them to express their action as a joint body, the clerical part of changing the roll actually filed by the assessor, would be performed at any time before it was turned over to the sheriff for collection, and while the assessment roll is the sheriff's warrant, it can only be a warrant in law when the roll had been approved by the board of supervisors. The mere fact of making an assessment by the assessor does not constitute a legal assessment, but under section 4306, of the Code of 1906, the board itself must approve the assessor's roll, and the order of approval must be on the minutes. It might be, that after the roll has been filed with the sheriff and the time for the collection of taxes had expired, that the sheriff would be fully protected and the taxpayer probably also would, where he had paid on the assessment of the roll in the hands of the sheriff without actual knowledge of an action of the board of supervisors. It is clear to my mind that if the taxpayer, or the sheriff, either, knew that the orders actually entered on the minutes existed, and knew the contents of these orders, that they could not escape liability for taxes on that account.

I think it is perfectly proper and legal for the board, at the subsequent meetings, which were lawful meetings,

to enter any entry necessary *nunc pro tunc,* and such order, when so ordered, would be effective from and after the date of entry.

It appears that the appellee did not appeal from the order of the board of supervisors at the September meeting, which was the judicial act which fixed liability upon him for the extra valuation placed on his property, and having failed to appeal, and it being competent for the board to perform the mere ministerial act of inserting the figures on the assessment roll, he could not maintain his appeal in the present suit, but if mistaken in this, this being an appeal from the board of supervisors assessing his property, the circuit court should have entered the order after hearing the proof as to value of the said lands just as the board should have entered it at the proper time under section 4305.

The clear and manifest purpose of section 4306 is to have the property of the entire county listed at a fair value and on an equal basis according to its value with all other property in the county, and the mere fact that an omission was made, by the inserting of figures on the assessment roll, could not defeat the right of the county to its lawful taxes. It certainly cannot be contended, with any show of reason or justice, that the order of the board, which was entered on the minutes, is an approval of the roll as filed with the auditor, for when you take the recitals of the order, taken as a whole, and in all its parts, and all entries being taken together, it clearly appears that the board did not approve the roll as filed by the assessor.

Whitfield, McNeil & Whitfield, for appellee.

The court will see clearly that the sole question presented for the supreme court's decision by this record, is the construction of section 4305 of the Code of 1906. This section is clear and explicit in its provisions, and mandatory and specific in its requirements.

Furthermore, it has already been emphatically and clearly construed by this court in the case of *Yazoo Delta Investment Company* v. *Suddoth,* 12 So. 246, which decision, we submit, sets at rest all controversy as to the proper and only construction of said statute. That case was decided in 1893, and has been acquiesced in ever since, and never has been overruled. On the contrary, the same principle which it announces has been re-announced by other cases since it was decided, and these cases ought to set at rest, for ever, all controversy as to the only proper construction to be placed on section 4305.

A mere reading of said section makes it manifest that it is made the mandatory duty of the board of supervisors, at the meeting for the hearing of objections to assessments, to carefully examine the land roll and cause all corrections, which they properly think should be made, to be made in the roll itself, which, after it had been done, the board shall approve the assessment and adjourn.

Any taxpayer, feeling aggrieved at the valuation of his property appearing on the assessment roll itself, is given the right to appeal to the circuit court within the next five days, and not thereafter. After the expiration of the five days from the adjournment of the meeting of the said board, the taxpayer is concluded from complaining, and, surely after the adjournment of the board, the board and the county ought likewise to be concluded from altering or spoliating or changing the roll in any manner. This is the universal holding of all the decisions construing this statute. The construction of this statute in a similar case was put up to this court in the case of *Yazoo Delta Investment Company* v. *Suddoth*, 12 So. 246.

The court, in this case, squarely held that section 4305 of the Code of 1906, is mandatory in its requirements that the board should cause all corrections to be made

on the roll itself, and said that this intention and purpose and construction of the statute contemplated by the legislature, was clear from the concluding paragraph, which the court quoted. We agree with the court, that the concluding sentence of this paragraph is so clear as to need no construction. Its meaning plainly is, that the only way a board of supervisors can, in the eye of the law, approve an assessment roll, is to cause the corrections to be made in the roll itself. and then enter an order in its minutes approving the roll, from which it must necessarily follow, that after the board has approved an assessment roll, the citizen who is bound thereby to pay taxes on whatever valuation his property has on the roll itself, is only required to go and inspect for himself the roll itself, he surely is not required to go through all the minutes of the board of supervisors to see whether they have ordered corrections to be made, which have not been made; and only need to know that the board had met for the purpose of equalizing the assessment and adjourned, and he has a right to rely upon the valuation appearing on the roll itself and, if he had no objection to said valuation, there is no reason for him to appeal within the next five days, no reason to concern himself thereafter about the valuation of his property, because, as he is concluded at the expiration of five days, so the county is concluded, from the date of the adjournment of the board, and the contract, as between the county and the citizen is closed, and must be enforced as written on the face of the assessment roll itself.

Not only is this construction, placed on this statute 4305 of the Code of 1906, by the supreme court of this state, wise, but it is necessary, as pointed out more recently, by the supreme court, speaking through MAYES, J., in the case of the *City of Biloxi* v. *Biloxi Real Estate Company*, 48 So. 730.

The court held, on viewing the whole record, that the real and true assessment was that shown by the assess-

ment roll filed with the clerk and approved by the board of supervisors at the time and place when they were required to examine and approve the roll. The statute itself provided, that the supervisors shall cause all change to be made in the roll and having done this to approve the roll. It fixes the time, it fixes the place when this shall be done, and this court has, over and over again, decided that this assessment when made, is conclusive against the taxpayer, and the state and the taxpayer is only given five days in this particular case in which to appeal from an order of the supervisors raising his assessment. If he goes to the clerk's office and finds his assessment as he gave it in, he has a right to rely upon the fact and the law that this is his assessment for the ensuing two years. It makes no difference how badly he may be dissatisfied, if he has waited his five days and failed to appeal, there is no remedy in the statute for him, he is concluded by the delay and must suffer the consequences. The assessment made by the assessor under the oath and filed with the supervisors and accepted by them is presumed to be correct, but a time specified in law, at which the board of supervisors can give it a critical examination and make such changes in the roll, may be proper and just. The taxpayer knows when this time is fixed and is presumed to be on hand and make timely objection to any raise made in the rolls that are not proper. There was nothing to appeal from in this record until after the copies of the roll were completed by the clerk, and the board convened on the 10th of October and without any authority of law, we contend, changed these important books. The time for appellant to appeal from an assessment where he felt himself aggrieved was long since passed. He did have a right to appeal from a void order of any kind and that is simply what he has done in this case. If the roll duly sworn to and filed by the assessor, is approved by the board and that body hadn't judg-

ment or discretion enough to make changes in it at the time and place as provided by law, would it not be entirely proper for a trial court to accept the original assessment as valid.

We respectfully submit that the court committed no error in declaring the true assessment of appellee's property to be as set out in the order.

COOK, J., delivered the opinion of the court.

At the July term, 1911, of the board of supervisors of Covington county, an order was made extending the time for the filing of the assessment roll to the first Monday in August. At the August meeting it was ordered that the assessment roll for the fiscal year 1911 be placed on file for the next thirty days for examination. At the September term the following order was entered upon the minutes of the board:

"It is ordered by the board that the land assessment roll of said county, as filed by S. Barnes, tax assessor, be and the same is hereby approved as corrected, and the clerk of the court is ordered to make copies thereof as provided by law."

It appears that at the September term the board of supervisors raised the valuations fixed by the assessor on appellee's land, and entered upon its minutes an order showing the valuations fixed by the assessor and raised valuations fixed by the board.

The changes in valuation ordered by the board were not entered on the assessment roll, and the clerk, in making copies of the roll for the tax collector and auditor of public accounts, copied the roll as made by the assessor. At the October meeting of the board it was discovered that the changes in the valuations of appellee's lands ordered by the board had not been made on the assessment roll, whereupon the board entered an order citing appellee to appear at an adjourned meeting of the board to be held October 11th, and show cause

why the assessment roll should not be corrected by them, making the changes on the roll, which the board had ordered to be made at the September term. Notice was served on appellee five days before the 11th day of October. On October 11, 1911, the board proceeded to enter upon the assessment roll the changes in the valuations, which it had ordered to be made at its September meeting. From this action an appeal was prosecuted to the circuit court, which court overruled and set aside the order, and the board prosecutes this appeal.

When the board approved the assessment roll and directed the clerk to make copies thereof, could it thereafter recall the roll and have same changed?

It was of course the duty of the board of supervisors to see that all changes made by it were entered on the roll. If the board failed to perform this duty, could it afterwards do what it should have done in the first instance?

The scheme for the assessment and collection of taxes is purely statutory. The assessor is required to assess all property at it true value, and, after he has done so, his assessment is submitted to the board of supervisors for its approval. The board is empowered to equalize the assessments, and the time when this can be done is fixed by law.

The statute fixes the first Monday in July as the time for the filing of the assessment roll made up by the assessor, but the board of supervisors may extend the time to the first Monday of August, and no longer. Section 4293, Code of 1906. It is true the board may extend the time for the assessment of property and the filing of the assessment roll beyond the first Monday of August, but this extension of time cannot be made where the assessor makes the assessment. Sections 4294 and 4295, Code 1906. The last-named sections are emergency provisions and have no application to the regular assessment contemplated by the statutory scheme.

In the present case the board extended the time for the filing of the assessment roll by the assessor to the first Monday in August, and the power for this extension of time is given to the board by section 4293.

In the regular order of things, it is the duty of the board to hold a meeting on the first Monday of August, and "examine the assessment rolls, and hear and determine all exceptions thereto, and shall sit from day to day until the same shall have been disposed of, and all proper corrections shall have been made." Section 4297, Code 1906. But, if the assessor is given an additional time to file the roll, the meeting to examine, hear exceptions, make corrections, and increase or diminish the valuation of property must be held on the first Monday in September. Section 4298, Code 1906.

By section 4307, Code 1906, the clerk is required to make two fair copies of each roll, "as examined and corrected," one of which he is required to transmit to the auditor of public accounts, and the other he is required to deliver to the tax collector on or before the first Monday in October.

In the present case the rolls were approved by the auditor.

It seems clear that the legislature intended and did fix a time limit for the preparation and final completion of the assessment rolls, and no warrant can be found in the statutes for the theory that the board of supervisors is a court of plenary powers to alter the assessment rolls at any time.

In *Yazoo Delta Investment Co.* v. *Suddoth,* 70 Miss. 416, 12 So. 246, this court used this language:

"Manifestly all changes made by the board must be noted on the roll, for it in its completed form, is the warrant upon which the collector acts in collecting the taxes due, and a copy of the roll filed with the auditor constitutes the charge against the collector for all taxes due to the state."

The statute prescribes the time for the final entries on the books, and commands the board to remain in session from day to day until the books are completed. Obviously, there must be a limit to interferences with the rolls, and, as the law requires the completed roll shall be in the hands of the auditor on or before the first Monday in October, there is no escape from the conclusion that the board must complete its supervisory work before that time. When the board meets to correct, change, and alter the rolls, it must remain on the job until it is completed.

To do the work right, it was the duty of the board to enter on the rolls all changes made by it. If such changes were not noted on the roll, no changes were made, and, the board having adjourned, it no longer possessed the authority to make changes in assessments.

The judgment of the circuit court is affirmed.

Affirmed.

STANDARD OIL CO. OF KENTUCKY *et al. v.* STATE *ex rel.*, ATTORNEY-GENERAL.

[65 South. 468-61 South. 981.]

1. MONOPOLIES. *Trust and combinations in restraint of trade. Action for penalty. Jurisdiction. Commerce. Intrastate commerce. Imports. Commerce. Concurrent power to govern. Inter-state Commerce. Anti-trust laws. Offenses. Statutes Pleading. Appearance. Waiver of objection. Jurisdiction acquired. Special Appearance.*

Where several oil companies formed a combination whereby the stock of each was transferred to the Standard Oil Company, the purpose being to destroy competition and monopolize the trade in petroleum throughout the United States, and each of the subsidiary companies was assigned certain territory in which to do

business, the state of Mississippi being assigned to the Standard Oil Company of Kentucky, and such company, in furtherance of the conspiracy and to destroy competition, on numerous occasions offered petroleum for sale on the same day, in different localities of the state at different prices. In such case the conspiracy being one having as one of its objects a monopoly of that portion of the trade lying wholly in Mississippi, to be accomplished, in part at least, by transactions lying wholly within the state, was punishable under the laws of the state.

2. TRANSACTIONS CONSTITUTING INTRASTATE COMMERCE. *Imports.*

Sales and distributions of petroleum where made by a company after the petroleum had been received by it in this state and had become incorporated into the general Map of property therein, constituted intrastate commerce, and are governed by state's laws.

3. INTERSTATE AND INTRASTATE COMMERCE. *Concurrent power to govern.*

A conspiracy which has for its object the creation of monopoly only in that part of the commerce in a commodity which is intrastate is subject only to the laws of the state affected thereby; but one having for its object the creation of a monopoly in both interstate and intrastate commerce in a commodity is necessarily subject to the laws both of the general government and of the state affected thereby.

4. INTERSTATE COMMERCE. *Concurrent power to punish.*

A consipacy to monopolize both inter and intrastate commerce in a commodity but to be consumated by dealing with the commodity only while it is the subject of an interstate transaction is punishable only under the laws of the general government.

5. INTRASTATE COMMERCE. *What law governs.*

A conspiracy to monopolize trade in any commodity, to be punishable under state laws, must have as one of its objects a monopoly in the intrastate trade, to be accomplished in part at least by transactions which are also wholly intrastate.

6. MONOPOLIES. *Anti-trust laws. Action for penalty. Pleading.*

The fact that in a suit by the state against several oil companies for the penalty for violating the anti-trust statute, the bill prayed for the imposition of separate and joint penalties was immaterial, since each is liable for the full penalty.

7. MONOPOLIES. *Anti-trust law. Action for penalty. Pleading.*

Where a bill was filed by the state against several oil companies for the penalty for the violation of the anti-trust law of the

state, it was not error for the court to refuse to eliminate from the bill, facts which also disclosed a violation of the federal anti-trust law. When the two offenses against the federal and the state law are part and parcel of the same conspiracy.

8. ENTERING APPEARANCES. *Waiver of objection.*

Where in an action against two foreign corporations, their attorney entered into a written agreement with plaintiff's attorney agreeing that the two companies would appear in the case without further process and continued; "It is however expressly understood that this agreement is merely to facilitate the progress of the case and defendants are not to be understood thereby as waiving any of their defenses, or as waiving their right to object to the jurisdiction of this court to entertain this suit because of their nonresidence." Such an agreement was a waiver of process and an entering of appearance by the corporations.

9. APPEARANCE. *Jurisdiction acquired. Special appearance.*

Where a summons or citation or the service thereof is quashed on motion of a defendant, he gains a continuance of the cause, but nothing else, since, as provided by Code 1906, section 3946, his appearance for the purpose of the motion gives the court jurisdiction of his person for all purposes of the case.

APPEAL from the chancery court of Lauderdale county. HON. SAM WHITMAN, Chancellor.

Suit for penalties for the violation of the anti-trust laws of the state of Mississippi, on the relation of the attorney-general against the Standard Oil Company of Kentucky and others. From an order overruling their demurrer, defendants appeal.

The facts are fully stated in the opinion of the court.

Hunter C. Leak, Humphrey, Middleton & Humphrey, and *Mayes & Mayes,* for appellants.

Ross A. Collins, Frank Johnston and *Geo. H. Ethridge,* for appellee.

SMITH, J., delivered the opinion of the court.

This is a suit instituted by the attorney-general to recover from appellants the penalties prescribed by our

anti-trust statute for an alleged violation of the statute by them. This is its second appearance in this court. When here before, the only defendant to the bill was the Standard Oil Company of Kentucky, and we then held that the bill failed to state a cause of action, because of the failure to allege that the sales made on the same day in different localities at different prices were made for the purpose of destroying competition. On the return of the cause to the court below an amended bill was filed, bringing in new parties defendant, to wit, the Standard Oil Company of New Jersey and the Standard Oil Company of Louisiana, and alleging, with great wealth of detail, a conspiracy made for the purpose of monopolizing the trade in petroleum and its products. Afterwards a supplemental bill was filed making the Galena Signal Oil Company a party defendant. To these bills general and special demurrers were interposed by the Standard Oil Company of Kentucky, and the other defendants appeared specially and excepted to the jurisdiction of the court. These demurrers and exceptions were overruled, and an appeal granted by this court to settle the principles of the case.

The grounds of the general demurrer filed by the Standard Oil Company of Kentucky here relied on are: First, "the said amended bill shows no cause of action against this defendant which is cognizable by this court or by any state court of Mississippi;" second, "the said amended bill does not follow up and amend the original bill, but is a departure therefrom, and from the judgment and decree of the supreme court heretofore rendered in this cause, and is an attempt to state another and a wholly different cause of action from that attempted to be stated in the original bill;" and third, "the said amended bill is multifarious." These will be taken up and disposed of in the order here set forth.

Under the first ground of this demurrer the contention of counsel for appellants is that the amended

bill presents a case of a conspiracy to destroy competition, and to monopolize interstate commerce, in petroleum products, and therefore a violation of the federal anti-trust law, cognizable only in the federal courts. The amended bill set forth at great length the formation of the original Standard Oil Trust of 1882 by a large number of persons and corporations engaged in the petroleum industry, followed later by the incorporation of the Standard Oil Company of New Jersey, the name of which corporation was afterwards changed to the Standard Oil Company, which company acquired all of the stock of the corporations then parties to the trust agreement, and thereby practically took the place of the trustees provided for therein, all of which was for the purpose of enabling the parties to the original agreement, and afterwards the Standard Oil Company and its subsidiary corporations, to destroy competition and monopolize the trade in petroleum and its products throughout the United States and its territories, including the state of Mississippi; that in furtherance of this conspiracy in which all of the parties defendant to the bill participated, the territory in which each of the subsidiary corporations was to do business was assigned to it, and no other corporation was permitted to do business therein; that the prices at which petroleum products were to be sold were, after its organization, fixed by the Standard Oil Company, which company controlled and directed all of the operations of the subsidiary companies; that, in furtherance of the design of this trust and combination to monopolize the trade in petroleum products, the state of Mississippi was set apart to the Standard Oil Company of Kentucky, which company was given the exclusive privilege of making sales and distribution of petroleum products therein; that this company has been continuously from the 1st day of January, 1906, engaged in the sale and distribution of petroleum products in this state, maintaining for that

purpose depots in the various counties thereof, from which sales and distributions are made by means of tank wagons; that other persons, firms, and corporations are engaged in Mississippi in the sale and distribution of petroleum products who are not acting with appellants and have no connection with the combination and conspiracy complained of; that in furtherance of this conspiracy the Standard Oil Company of Kentucky on numerous occasions offered for sale petroleum products on the same day in different localities of the state at different prices, the difference of freight and other necessary expenses of sale and delivery considered, for the purpose of enabling the conspirators to monopolize the trade therein in Mississippi and throughout the United States and its territories. The bill further set forth that the combination here complained of was ordered to be dissolved into its several component parts by the supreme court of the United States in the case of *Standard Oil Co.* v. *United States,* 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, but that notwithstanding the conspiracy had remained in effect, and that the conspirators had continued to act in concert as theretofore in the same manner and for the same purpose. The prayer was for the imposition of the penalties provided by our anti-trust law and for the exclusion of appellants from doing business in the state. From this general statement of the allegations of the bill it appears that the conspiracy here complained of is one that has for its object the monopolizing of both the inter and intrastate commerce in petroleum products, that portion of this commerce which is wholly within the state of Mississippi being monopolized, or attempted to be monopolized, by the exclusion therefrom of all of the corporations included in this conspiracy, and permitting the Standard Oil Company of Kentucky alone to deal in petroleum products therein, and by that company's selling such

products, within the state at different places on the same day at different prices, whenever it becomes necessary so to do, in order to destroy competition at such places.

It is true that no petroleum is produced in the state of Mississippi, and all petroleum sold and distributed by the Standard Oil Company of Kentucky in this state must necessarily have been imported from another state. These sales and distributions, however, as we understand the bill, were made by this company after the petroleum products had been received by it in this state and had become incorporated into the general mass of property therein; they therefore constituted intrastate commerce, and are governed by the state's laws, for an article which is one of interstate commerce by reason of the fact that it is the subject of a sale by a citizen of one state to a citizen of another, and it being transported from one state to the other, loses its character as such when the transportation has been completed and it is mingled with and becomes a part of the general mass of property in the state of its destination. It then becomes, in so far as the power of the general and state governments to regulate commerce is concerned, subject exclusively to the operation of the state laws. *Leisey* v. *Hardin,* 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128. The bill, therefore, presents a case of the violation of the laws both of the general government and of the state of Mississippi. This seems not to be disputed by counsel for appellant, their contention being that under the allegations of the bill the principal object of this conspiracy was to enable the conspirators to monopolize interstate commerce, and that the intent there alleged to monopolize intrastate commerce is a mere incident to the principal object, and that the two intents are so inseparably connected that the jurisdiction of the federal courts to punish therefor must be exclusive. In this we think counsel are in error. The

monopoly of intrastate commerce is one of the material objects of this conspiracy, and such a monopoly is not necessary, if such fact be material, to the maintenance of a monopoly of interstate commerce, the monopoly of the commerce of one character simply constituting a powerful factor in bringing about a monopoly of the other.

A conspiracy which has for its object the creation of a monopoly only in that part of the commerce in a commodity which is interstate is subject only to the laws of the general government, and one which has for its object the creation of a monopoly only in that part of the commerce in a commodity which is intrastate is subject only to the laws of the states affected thereby; but one having for its object the creation of a monopoly in both the inter and intrastate commerce in a commodity is necessarily subject to the laws both of the general government and of the states affected thereby.

It is true that under our form of government a conspiracy and acts done in furtherance thereof may violate both the laws of a state and of the general government, but be punishable only under the laws of the latter, and it may be that a conspiracy to monopolize both inter and intrastate commerce in a commodity, but to be consummated by dealing with the commodity only while it is the subject of an interstate transaction, would be punishable only under the laws of the general government.

In the case at bar, if, with the intent to monopolize commerce in petroleum products throughout the United States, appellants had agreed to do and had actually done only such things as relate to that portion of the commerce therein which is intrastate, they would have been punishable only under the laws of the general government, even though they intended to, and in fact did thereby, monopolize also that portion of the commerce therein that is wholly intrastate. In other words, a conspiracy to monopolize trade in any commodity to

be punishable under state laws must have as one of its objects a monopoly in the intrastate trade therein to be accomplished in part at least by transactions which are also wholly intrastate. The controversy here complained of, having as one of its objects a monopoly of that portion of the trade in petroleum products which lies wholly within the state of Mississippi, to be accomplished in part at least by transactions lying wholly within the state, is punishable under the laws thereof. Whether or not this conspiracy is punishable under the laws of the general government is immaterial, and has no real bearing on this controversy, for it is beyond the power of that government to regulate commerce which lies wholly within the state, and its laws can have no effect thereon, except in so far as it is necessarily affected thereby by reason of its intimate connection with interstate commerce.

The foregoing views find support in, and the question here under consideration seems to have been fully answered by, the case of *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. In that case a proceeding was commenced in behalf of the United States, under the so-called anti-trust act of Congress, passed July 2, 1890, 26 Stat. 209, ch. 647 (U. S. Comp. St. 1901, p. 3200). It was undertaken for the purpose of obtaining an injunction perpetually enjoining the six corporations, who were made defendants, and who were engaged in the manufacture, sale, and transportation of iron pipe at their respective places of business in the states of their residence, from further acting under or carrying on the combination alleged in the petition to have been entered into between them, and which was stated to be an illegal and unlawful one, under the act above mentioned, because it was in restraint of trade and commerce among the states, etc.

"The trial court dismissed the petition (*United States* v. *Addyston Pipe & Steel Co.* (C. C.) 78 Fed. 712), but

upon appeal to the circuit court of appeals the judgment of the court below was reversed, with instructions to enter a decree for the United States perpetually enjoining defendants from maintaining the combination in cast-iron pipe as described in the petition, and from doing any business under such combination."

The six corporations defendant to the petition were domiciled, one in Ohio, one in Kentucky, two in Alabama, and two in Tennessee.

"It was charged in the petition that on the 28th of December, 1894, the defendants entered into a combination and conspiracy among themselves, by which they agreed that there should be no competition between them in any of the states or territories mentioned in the agreement (comprising some thirty-six in all), in regard to the manufacture and sale of cast-iron pipe, and that in obedience to such agreement and combination, and to carry out the same, the defendants had, since that time, operated their shops, and had been selling and shipping the pipe manufactured by them into other states and territories, under contracts for the manufacture and sale of such pipe with citizens of such other states and territories."

One of the means by which this monopoly was to be maintained was that certain cities were assigned to each corporation in which none of the other conspirators would bid against it for sale of pipe, or, rather, the bids of the other members of the conspiracy would always be higher than that made by the corporation to which the cities had been assigned. A sale made by one of these corporations was an interstate one, and therefore interstate commerce, when the city in which the sale was made was situated in a state other than the one of the corporation's factory, and was intrastate when the factory and the city wherein the sale was made were both in the same state. The judgment of the circuit court of appeals, reversing the decree of the trial court

and directing that a decree be entered enjoining the defendants to the petition from maintaining the combination in cast-iron pipe and from doing business under such combination, was modified by the supreme court so as to exclude therefrom that portion of the combination which affected intrastate commerce and be limited to that portion thereof which affected interstate commerce.

It will be observed that this conspiracy or combination had for its object a monopoly of both the inter and intrastate commerce within states and territories mentioned in the agreement, thirty-six in number, the monopoly of the commerce of each character to be brought about and maintained, as in the case at bar, by transactions both interstate and intrastate.

In its opinion modifying the decree of the lower court the supreme court, through Mr. Justice PECKHAM, said:

"The views above expressed lead generally to an affirmance of the judgment of the court of appeals. In one aspect, however, that judgment is too broad in its terms—the injunction is too absolute in its directions—as it may be construed as applying equally to commerce wholly within a state as well as to that which is interstate or international only. This was probably an inadvertence merely. Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state. The combination herein described covers both commerce which is wholly within a state and also that which is interstate.

"In regard to such of these defendants as might reside and carry on business in the same state where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the state eventually obtained it.

"The fact that the proposal called for the delivery of pipe in the same state where some of the defendants resided and carried on their business would be sufficient, so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside of the state as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own state could not be reached by the federal power derived from the commerce clause in the Constitution.

"To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own state, it is modified and limited to that portion of the combination or agreement which is interstate in its character. As thus modified the decree is affirmed."

But it is said by counsel for appellants that the federal anti-trust law as construed in *United States* v. *E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, does not include agreements to manufacture, and that in modifying this injunction which was a mere minor feature of the decision, the court pointed out that the injunction was too broad—

"because, said they, inasmuch as these people who were engaged in these transactions were manufacturers, and

consequently might contract about the manufacture of an article, the sale of that article, and the delivery of that article, and because the whole process of manufacture, sale, and delivery might take place within the limits of one state, to such a transaction the act of Congress could not extend; and, therefore, the injunction by its terms should not be broad enough to include a transaction of that sort. That feature of the decision has no application whatever to the case at bar, and that for the reason that this amended bill shows clearly that the Standard Oil Company is not occupying Mississippi with an article produced in Mississippi, to be vended and delivered within the limits of the state of Mississippi; but, on the contrary, the whole case made in the bill is to the effect that the article dealt with, and about which this suit is brought, was not produced by the Kentucky company, but by another company. Neither was it produced by any agency whatever within the limits of the state of Mississippi; it was not a Mississippi manufacture or production; the bill shows all through that it was an article introduced by transportation and commerce across the state line; it was a foreign production as to the state of Mississippi; the subject of commerce, alone, so far as the state of Mississippi is concerned, and nothing else. Wherefore, as we have shown, this bill does not fall within the qualified reservation made in the Addyston pipe case, but clearly falls under the rule expounded in the three cases which we have cited and relied on above."

Counsel, we think, misconceive the ground of this decision. It is true that the parties to the combination were manufacturers, but the court pointed out that, although a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other states of specific

articles were proper subjects for regulation because they did form part of such commerce, and that the combination then under consideration related, not to the manufacture, but to the sale and delivery of specific articles. The decision in all of its aspects proceeds altogether on the theory that the combination there complained of, both in its interstate and intrastate character, was one relating to the sale and delivery of a commodity, and the court nowhere gives as a reason for the modification of the injunction that the parties to the combination were manufacturers, but places it solely upon the ground that the federal statute has no application where the sale, transportation, and delivery of an article all takes place within a state. Had the court proceeded on the theory that the combination had for its purpose a monopoly in the manufacture and not in the sale and delivery of articles, the injunction, under the authority of the Knight Case, must necessarily have been dissolved *in toto* instead of partially.

In support of their contention that the jurisdiction of the federal courts over this alleged conspiracy is exclusive, counsel for the Standard Oil Company of Kentucky have called our attention to the following language contained in the opinion of the supreme court of the United States in the case of *Standard Oil Co.* v. *United States*, beginning at page 81 of 221 U. S., at page 524 of 31 Sup. Ct., at page 653 of 55 L. Ed. (34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734):

"We think that, in view of the magnitude of the interests involved and their complexity, the delay of thirty days allowed for executing the decree was too short, and should be extended so as to embrace a period of at least six months."

"During these six months, therefore," say counsel, "it was lawful to continue the then existing combination," and if the state be now permitted to recover from appellants the penalties alleged to have been incurred by

them for maintaining the combination during that time, they will thereby be punished for doing what the supreme court of the United States has adjudged lawful. "This but illustrates," they say, "in another way the confusion that must inevitably result where there is a proceeding taken under the Sherman anti-trust law and a proceeding taken under a state trust law growing out of exactly the same facts. One or the other must necessarily be exclusive; otherwise confusion will inevitably result; that is, one court may, for reasons which seem equitable, permit a combination to exist for a limited period, in the interest of the public, while the other court may be visiting the same corporation with enormous penalties for continuing the same combination during exactly the same period."

We think counsel misconceive the effect of this modification which the supreme court directed the trial court to make in its decree. The combination which was and had been adjudged to be in violation of law was not thereby made lawful during the six months given it in which to dissolve, nor was it thereby relieved from any penalties incurred under any statute, or from liability to damage inflicted upon any one by continuing in existence for that time. The court did not so intend; but, even if it had, it would thereby have exceeded its jurisdiction, for the reason that under our form of government no court, unless specially authorized by law, has the power to grant permission to do unlawful acts.

In order to dissolve the combination as it then existed, it was necessary for the Standard Oil Company of New Jersey to dispose of the stock owned by it in the other corporations, by means of which it controlled their operations. This could not be done on the instant. It was therefore necessary to grant it time in which to do so, and the granting of this time in which the decree should be complied with simply meant that the parties to the combination would not be in contempt of court by

not complying with its decree before the expiration thereof. But even if we concede that the existence of this combination during these six months was lawful, it was lawful only in so far as the laws of the general government are concerned, and the parties thereto were not, by reason of this decree, licensed to engage in commerce lying wholly within a state in violation of the laws thereof; for, as we have heretofore pointed out, and as the supreme court of the United States has more than once decided, the general government can exercise no control over commerce that is wholly intrastate. The confusion which counsel say if the result of permitting the courts, both of the general government and of the states, to deal with causes of this character, if confusion in fact it can be called, is only such as will necessarily arise in all cases where the laws both of the general government and of the states have been violated.

We have not left out of view the line of cases cited by counsel, of which *Standard Oil Company* v. *United States,* 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, *Swift* v. *United States,* 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, and *Montague & Co.* v. *Lowrey,* 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, are a type, holding that a case is stated under the federal anti-trust laws of which the federal courts have jurisdiction, although the combination and agreement complained of includes both interstate and intrastate transactions. The views herein expressed are not in conflict with these cases, but rather are in accordance therewith, for, as we have pointed out, the combination and agreement of the character here under consideration may violate the laws both of a state and of a general government and be punished in the courts of each.

There is no merit in the remaining grounds of the general demurrer, for the amended bill does not "state another and wholly different cause of action from that attempted to be stated in the original bill"; it simply

states the same cause of action, attempted to be stated in the original bill, more fully and probably in unnecessary detail, and the new defendants, being parties to the conspiracy alleged in the bill, were properly made defendants thereto. The fact that the bill prays for the imposition of separate and not joint penalties is immaterial. The course here pursued with reference to the joinder of defendants is the same as that pursued in the cases of *Grenada Lumber Co.* v. *State,* 98 Miss. 536, 54 So. 8, and *Dukata* v. *Adams,* 101 Miss. 433, 58 So. 475.

The special demurrers which seek to eliminate from the bill all of the allegations which set forth facts which disclose a violation of the federal anti-trust law were properly overruled, conceding without deciding that this question can be thus presented. The intent to violate the federal statute is so intimately connected with the intent to violate the statute, in fact being a part and parcel of the same conspiracy, that one cannot be intelligently set forth without disclosing the other; or, to be more accurate, the one can be more intelligently set forth in language which also discloses the other. Moreover, the facts thereby disclosed may be necessary in order to connect the other defendants with the acts of the Standard Oil Company of Kentucky, and to enable the court to determine the true intent with which the various sales of petroleum products set forth in the bill were made by this company. The allegation contained in paragraph 24 of the bill setting forth the dissolution by the federal courts in 1911 of the combination here complained of, as it then existed, simply explains why the methods alleged to have been pursued by appellants in order to continue to maintain a monopoly in petroleum products after this dissolution was ordered were different from those alleged to have been pursued by them prior thereto, and therefore the allegation is proper, though probably not a necessary one.

This brings us to the exceptions filed by the other defendants to the jurisdiction of the court. There can be

no question of the court's jurisdiction of the subject-matter, and if it had jurisdiction of the person of the defendants, its jurisdiction was complete. These other defendants have no local agent in this state upon whom service of process could be had, so that they were summoned by publication in a newspaper. They appeared specially and excepted to the jurisdiction of the court. The ground of these exceptions was that the service of process by publication was void for the reason that:

"Foreign corporations can be served with process in a state only when doing business therein, and such service must be upon an agent who represents the corporation in such business."

The court overruled these exceptions and the Standard Oil Company of New Jersey and the Standard Oil Company of Louisiana joined in this appeal. After publication for these defendants had been made, the following written agreement was entered into between the attorney-general and Mr. Hunter C. Leake, attorney of record for the Standard Oil Company of New Jersey and the Standard Oil Company of Louisiana, and was by the attorney-general filed in the court below among the papers in this cause:

"In this cause it is agreed between the attorney-general, representing the state, and Hunter C. Leake, representing the Standard Oil Company of Louisiana and the Standard Oil Company of New Jersey, that the two companies named will appear in this cause without further process, making such appearance to the November term, 1913, and plead, answer or demur to the bill then.

"It is, however, expressly understood, that this agreement is merely to facilitate the progress of this cause, and the two companies named herein are not to be understood thereby as waiving any of their defenses, or as waiving their right, if any they have, to object to the jurisdiction of this court to entertain this suit as to them or either of them because of their nonresidence of the

state of Mississippi, and the fact claimed by them that they are not doing business in this state, or any other defensive point which they may desire to make.

"This September 6, 1913.

"[Signed] Ross A. COLLINS,
"Attorney-General, State of Mississippi.
"HUNTER C. LEAKE."

This agreement, which is altogether ignored by these exceptions, constitutes in plain and unambiguous language a waiver of process and the entering of an appearance by the defendants in the cause. The reservation of all defenses to the bill contained in this agreement was unnecessary, and added nothing thereto, and the reservation of the right to object to the jurisdiction of the court "to entertain this suit as to them, or either of them, because of their nonresidence in the state of Mississippi, and the fact claimed by them that they are not doing business in this state," cannot be construed to be the reservation of a right to object on the ground that no process had been served, for the occasion of the making of the agreement was that "further process" might be waived.

This question, however, is of no material importance, for the reason that, had the agreement not been made, or, conceding that appellant had the right under the agreement to appear specially for the purpose of filing the motion requesting the court to quash the citation, and conceding, further, that the citation should have been quashed in response to appellant's request, the issuance of further process for them would not have been necessary, for:

"Where a summons or citation or the service thereof is quashed on motion of a defendant he gains a continuance of the cause, but nothing else, since, as provided by Code 1906, section 3946, his appearance for the purpose of the motion gives the court jurisdiction of his person for all purposes of the case." *Illinois Central*

Railroad Company v. *Ann Swanson,* 92 Miss. 485, 46 So. 83.

Affirmed and remanded, with leave to appellants to answer within sixty days after mandate is filed in court below.

Affirmed and remanded.

NEW ORLEANS & N. E. R. Co. *v.* CHRISTINE HUMPHREYS.

[65 South. 497.]

NEGLIGENCE. *Trespassers. Injuries. Care after injuries.*

Where a railroad company takes charge of a trespasser who is injured on its tracks without its fault, it owes to him no higher duty than that dictated by ordinary or common humanity.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Suit by Mrs. Chrstine Humphreys against the New Orleans & Northeastern Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

R. H. & J. H. Thompson and *A. S. Bozeman,* for appellants.

The only duty owing by a railroad company to a trespasser is not to wantonly or wilfully injure him. *Railroad Co.* v. *Burnsed,* 70 Miss. 473; *Railroad Co.* v. *McAfee,* 71 Miss. 70, and many other Mississippi cases announcing this rule.

Where plaintiff was injured by being struck by an engine, without fault on the part of the railroad company, the latter was not liable by reason of the fact that its servants did not use their best judgment in affording

plaintiff necessary assistance after the accident. *Griswold* v. *B. & M. R. R. Co.*, 183 Mass. 434, 67 N. E. 354. A railroad company assuming charge of an injured trespasser, is charged with no higher degree of duty to him than that of ordinary humanity—common humanity. *Dyche* v. *Railroad*, 71 Miss. 361. See, also, for a like rule applied to a passenger injured by his own negligence, the case of *Railroad Co.* v. *Byrd*, 89. Miss. 308.

In furnishing medical or surgical aid for an injured person, the whole duty of the railroad company is performed when it employs a person of ordinary competence and skill in that profession; and having done so, it cannot be held liable for the carelessness or negligence of such surgeon in the performance of his duties as such. *South Fla. R. Co.* v. *Price*, 32 Fla. 46, 13 So. 638; *Atlantic Coast Line R. Co.* v. *Whitney*, 56 So. 937; *Dyche* v. *Railroad*, 79 Miss. 361; 3 Elliot on Railroads, sec. 1388. It would be absurd to insist that not only the selection of a physician and surgeon should be prudent, but that the company should guarantee that the surgeon selected would make no mistake and be guilty of no negligence. The very fact that there was required of a surgeon, in the line of his duty, the possession of a superior degree of skill and of knowledge of medicine, precludes the possibility that the officers or employees of a railroad company should exercise a supervisory control and direction of the time when and the mode in which the necessary surgical operation should be performed. *C. B. & Q. R. Co.* v. *Howard*, 45 Neb. 570, 63 N. W. 872. The above doctrine is peculiarly applicable to cases where such attendance is furnished by the railroad company at its own expense, and without cost to the injured person. *Pittsburg, etc., R. Co.* v. *Sullivan*, 141 Ind. 83, 27 L. R. A. 840, 50 Am. St. Rep. 314.

Tally & Mayson, for appellee.

Counsel complains of the action of the court in its refusal to exclude the testimony offered by plaintiff and

to direct the jury to return a verdict for the defendants. The action of the court was, as we think, eminently correct. This was a case peculiarly for the jury, as it was for it to say, under all the instructions in the case, whether or not the deceased received at the hands of these appellants, that treatment that common humanity dictates that the unfortunate and helpless should receive from the hands of parties having control over them after they are in a situation that they can render no assistance to themselves.

Counsel cites as supporting his contention of nonliability on the part of the defendants *Griswold* v. *B., etc., R. R. Co.,* 183 Mass. 434, 67 N. E. 354, but the doctrine announced in this case is directly at war with that promulgated in the Dyche case, *supra.*

It is said in the monographic note to *Union P. R. Co.* v. *Cappier,* 69 L. R. A. 513, at pages 534 and 536 of the note that the court in *Griswold* v. *Boston & M. R. Co.,* 183 Mass. 434, 67 N. E. 354, unsuccessfully attempts to distinguish *Central R. R. Co.* v. *State,* 96 Am. Dec. 545, from the Dyche case. The court refers to the case of *Dyche* v. *Vicksburg S., etc., R. R. Co.,* 79 Miss. 361, 30 So. 711, *supra,* but repudiates its authority and attempts to distinguish *Northern Central R. Co.* v. *State,* 29 Md. 420, 96 Am. Dec. 545, *supra,* in a manner not warranted by the report of that case, as already pointed out. The attention of the court is specially invited to this exhaustive note beginning on page 534 and running through page 536 where all the authorities on the subject appear to have been collated with great care. While it is true, as demonstrated by the author of the above note, that in some courts, a different rule prevails, yet it is asserted that the true rule is to be found in the case reported in 96 Am. Dec. and in the Dyche case, *supra.* We, therefore, confidently submit that in order for appellants to secure a reversal, the Dyche case must be overruled.

The two propositions relied upon by the appellee in this cause to sustain the judgment rendered in her favor

by the lower court are as follows: First, although the railroad company was not in fault in inflicting the original injuries upon Leslie Humphreys, whom it is conceded was a trespasser, still the railroad company, after he had been injured, was under legal duty, as well as moral obligation, to give him proper care and treatment which was proper and necessary under the circumstances of the case; second, even conceding that the railroad company was under no original legal duty, or obligation, to render proper and necessary care and attention to Leslie Humphreys after he was injured, it is unquestionably correct, as a legal proposition, in view of all the authorities, that having undertaken the care of the wounded man, it was then the legal duty and obligation of the railroad to discharge this duty and responsibility with proper care and attention under the circumstances of the case.

First, I will present to the court the proposition above stated, that the railroad company was under, not only a moral obligation resting on the commonest principles of humanity, but under a distinct legal obligation to give this unfortunate man proper attention after it was found that he had been injured and disabled in this railroad accident; and this proposition assumes that the railroad company is not liable for the original injury inflicted upon him.

The idea that the railroad company is under no duty, as a legal obligation, to a trespasser under any circumstances, is a total misconception of the legal doctrine and principles applicable to this class of cases. On the contrary, the best considered cases, and the great weight of authority, and the whole body of the reasoning on the subject *a priori* is, that a railroad company is under a large measure of duty and obligation of a legal character to trespassers who are ejected from their trains and who have been injured by railroad accidents without the fault of the railroad company. The universal doctrine is, that

while the railroad company has a right to eject a trespasser from its train, it is under legal obligation and positive duty to remove him or eject him in such prudent and reasonable manner as not to inflict any injuries upon him. It is also, I respectfully submit to the court, not only in accordance with the *a priori* principle of justice involved as well as the ordinary consideration of common humanity, but it is established by the very best considered decision on this subject, that a railroad company is under this measure of legal obligation and duty to render proper care and assistance to a trespasser who has been injured without the fault of the railroad company.

This court has placed itself in line with the best considered cases and doctrine on this subject in a case which, in legal principle, is identically in point with the case now under consideration, the case of *Dyche* v. *V. S. & P. R. R. Co.*, 79 Miss. 361; *Railroad* v. *Byrd*, 89 Miss. 308; *Railroad Company* v. *State*, 29 Md. 439 and 442, and the *Baltimore & Ohio Railroad Company* v. *State*, 41 Md. 288; *Weightman* v. *Railroad Co.*, 70 Miss. 563; 70 Miss. 563, 567, 568; 81 Ky. 624, 635; *Johnson* v. *C. R. & P. R. R. Co.*, 58 Iowa, 348; 58 Iowa, 348, 351, 352; *Klein* v. *C. P. R. R. Co.*, 37 Cal. 401; 37 Cal. 400; *Railroad Company* v. *State to use of Price*, reported in 29 Md. 420, 96 Am. Dec. 545, 552; Beach on Contributory Negligence (2 Ed.), page 277, 215; *Waldros* v. *R. R. Co.* (Ky.), 54 L. R. A. 923; *Louisville, C. & St. L. R. R. Co.* v. *Sullivan*, 81 Ky. 624; *L. & N. R. R. Co.* v. *Ellis*, 97 Ky. 679; *L. & N. R. R. Co.* v. *Logan*, 88 Ky. 232; S. C. 3 L. R. A. 80.

Second, even conceding that the railroad company was under no original liability to care for this injured man, there is no doubt whatever of the correctness and soundness of the proposition, that when the railroad, or its employees, have actually assumed the duty and responsibility of taking the charge and care of an injured person, although he is a trespasser and injured without the fault

of the company, the company is then, having assumed the responsibility, under duty to furnish reasonable care and proper treatment for the injured person. This proposition is stated in the text of 33 Cyc. of Law, 774.

I also call the attention of the court, on this proposition, to the case of *Union Pacific Railroad Company* v. *Cappier,* 66 Kan. 649 (S. C. 72 Pac. 281; S. C. 69 L. R. A. 513), and *N. C. Railroad Co.* v. *State,* 29 Md. 421. In presenting these questions to the court I have preferred to state, as the main proposition relied on for the appellee in this case, that according to the best considered cases and the entire weight of reasoning, as well as in view of the *a priori* principles of justice and humanity, that the railroad company is under duty, a legal duty as well as a moral obligation of humanity, to take care of a wounded or injured trespasser; but as I have presented this case to the court, it is clear that even upon the doctrine conceded by the decision of the Massachusetts court in the Griswold case, the railroad company in this present case is liable upon the distinct ground that they assumed the duty and responsibility of taking care of this injured trespasser, and therefore they are held to a proper and reasonable performance of their duty to be determined by a jury under all the circumstances of the case.

COOK, J., delivered the opinion of the court.

Appellee sued the appellant railroad company for damages for the neglect and want of care on the part of the railroad company for her husband after he had been injured by a railroad accident. The jury returned a verdict in appellee's favor for five thousand dollars, and from a judgment based upon this verdict this appeal is prosecuted.

It is not claimed that the railroad company was in any way responsible for the accident, or is any way liable for the original injury to appellee's husband, and it is con-

ceded that he was a trespasser at the time he received the hurt. When the passenger train of appellee reached Poplarville, at ten o'clock on the night of the 5th of April, 1912, Mr. Humphreys was found on the pilot or "cowcatcher" of the locomotive with a shattered leg, absolutely helpless, and covered with the excrement of some animal, presumably a cow or a horse. The theory is that a few miles south of Poplarville the locomotive struck a cow or horse, which was thrown on the pilot and caused the injury to Mr. Humphreys, who it is conjectured was stealing a ride. His leg was shattered from the knee to the foot. When it was discovered that Mr. Humphreys was injured, two of the employees of the railroad assisted him from the pilot, and carried him to the depot platform, and laid him down there. Some bystanders removed the injured man to a truck soon after he was placed on the platform. In removing him from the pilot of the locomotive to the platform two railroad employees each took him under each arm, and this caused his wounded leg to drag on the ground, doubtless causing him much pain. It is sure that the injured man suffered excruciating pain, and that he begged the railroad employees to take him to Hattiesburg, his home.

It appears that the railroad people thought it best to leave him where he was, and to call a physician to treat him there. At any rate, they refused to take him to Hattiesburg on that train, but did send for a physician, who arrived on the scene about the time, or soon after, the train proceeded on its way. The physician took charge of the injured man and administered opiates to relieve his suffering, but did not do anything more. It seems that a fast freight train bound for Hattiesburg was due to arrive at Poplarville about thirty minutes after the passenger train, but on that night the freight was something more than an hour late. When the freight train arrived, Humphreys was put upon the train and carried to Hattiesburg, accompanied by the physician.

When he reached Hattiesburg, Homphreys was placed in the hands of his friends and taken to the hospital, where his leg was amputated. He died in a few days after the operation.

It is claimed that, if Humphreys had been carried to Hattiesburg on the passenger train, he would not have died. To prove this, a physician testified that the injured leg should have been removed as early as possible after the injury was discovered, and, in his opinion, the man would have survived, had he been carried on to Hattiesburg and placed in the hands of competent surgeons. This physician also said that it was highly important that the filth should have been removed at once. The witness testified at great length, and described in detail how the injured man should have been treated. The evidence shows that Humphreys did not receive the treatment which the expert said was necessary.

The theory seems to be that when the employees of the railroad removed the wounded trespasser from the pilot of the locomotive and placed him on the platform, it became the duty of the railroad company to do everything possible to insure the comfort and safety of the trespasser. At the most, if the railroad company assumed charge of the injured man, it was charged with no higher duty to him than ordinary or common humanity. It is clear that the train was not equipped to care for a man injured as this man was, and it is also clear that he could not have had the care of a skilled surgeon if he had been taken away on the passenger train. It will be assumed that train crews could not know what was best for the man, and surely, when they called a physician, who it is presumed did know, and placed him in charge of the physician, it cannot be said that they did not treat him with common humanity.

From our standpoint, the railroad employees did what was apparently the proper thing to do; and, even if they did not, there is nothing in their actions to authorize one

to believe that they ignored the dictates of common humanity. In reversing this case we have assumed that the railroad company was under duty to treat the trespasser with ordinary humanity, and, further, that it assumed charge of him when they took him from the locomotive. If a mistake was made, it was a mistake of judgment, and for this mistake the railroad is not liable. The peremptory instruction should have been given.

Reversed and remanded.

SMITH v. STATE.

[65 South. 642.]

PERJURY. *Subornation of perjury. Evidence.*

Where an indictment charged that accused attempted to induce one Bardsley to commit perjury by swearing that he, Bardsley had not bought cocaine from one Cox and to act crazy before the grand jury, a conviction of subornation of perjury cannot be had unless the state shows by evidence: First, that Cox had sold Bardsley cocaine, and second, that Bardsley knew that Cox was the person who sold him the cocaine, and third, that accused knew that in the event Bardsley testified that he did not know who sold him the cocaine, he would be stating that which would be false.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

E. A. Smith was convicted of attempted subornation of perjury and appeals.

Appellant was indicted and convicted of attempting to suborn perjury. The indictment charges that one F. C. Cox had been charged with selling cocaine and a warrant issued by a justice of the peace for his arrest, and that on the hearing said Cox had been bound over to await the action of the grand jury, and that, before the

grand jury had convened for the purpose of investigating the charge, this appellant, A. E. Smith, "unlawfully, feloniously and corruptly did, by the offer of two hundred dollars as aforesaid, unlawfully, feloniously endeavoring and attempting to procure said Will Beardsley a witness as aforesaid to commit a willful and corrupt perjury in the manner and form aforesaid." On the trial, Beardsley testified that, while the charge was pending against Cox, appellant approached him and offered him two hundred dollars to swear before the grand jury that he had not bought cocaine from Cox and endeavored to have him "act crazy" when he appeared before the grand jury, and state that he did not know the name of the man from whom he bought cocaine, and tried to get him to give unintelligible answers to questions propounded by the grand jury so that they would not return a true bill against Cox. The case was submitted to a jury on instructions of the court and resulted in a conviction. On appeal, the granting by the court of the first two instructions requested by the state is assigned as error. Said instructions are as follows:

"(1) The court instructs the jury for the state, if you believe from the testimony beyond a reasonable doubt that Will Beardsley was a material witness in the case of the state of Mississippi against F. C. Cox wherein F. C. Cox was charged with the unlawful and felonious sale of cocaine, and that the said F. C. Cox had been required to give bond to await the action of the grand jury of Forrest county on said charge, and that the said Will Beardsley had been required to enter bond to appear before the said grand jury as a witness against the said Cox, in said cause, and that, before the convening of said grand jury to which said Cox was to await, the defendant, A. E. Smith, unlawfully, corruptly, and designedly offered the said Will Beardsley the sum of two hundred dollars to appear before said grand jury and unlawfully and corruptly commit perjury, and upon his cor-

poral oath to act before said grand jury like he was crazy, and to say before said grand jury he did not buy cocaine from said Cox, and that he did not know the said Cox, and that he did it with the intent then and there of preventing the said grand jury from indicting the said F. C. Cox on the charge aforesaid as charged in the indictment, then it is the duty of the jury to find the defendant guilty as charged.

"(2) The court instructs the jury for the state that, before you are warranted in convicting the defendant, it is not necessary that you should believe from the testimony beyond a reasonable doubt that the defendant actually paid Will Beardsley two hundred dollars, or that he actually tendered the said Will Beardsley two hundred dollars, but you are warranted in convicting the defendant if you believe from the testimony beyond a reasonable doubt that he offered the said Will Beardsley the sum of two hundred dollars and knowing at the time that the said Will Beardsley was a witness and under bond to appear before the next grand jury of Forrest county as a material witness against F. C. Cox in the case of the state against F. C. Cox on a charge of unlawfully and feloniously selling cocaine, intending thereby to cause the said Will Beardsley to appear before said grand jury and unlawfully and corruptly commit willful perjury, and upon his corporal oath to act before said grand jury like he was crazy, and to say before said grand jury that he did not buy cocaine from the said Cox, and that he did not know the said Cox, willfully and feloniously intending then and there to prevent the said grand jury from indicting the said F. C. Cox on the charge aforesaid in the indictment."

Flowers, Brown & Davis, for appellant.

At every stage of this trial the prosecution overlooked the vital element in the charge, that is, the falsity of any statement to the effect that Beardsley did not buy co-

caine from Cox and did not know Cox, nor did not know from whom he bought it.

This is fundamental. It is not a technicality. There is not a word of proof in the record to enable this court, or the jury, to determine whether Beardsley bought cocaine from Cox or whether he knew Cox or knew that he bought cocaine from him. And in the second place the proof should go further and show that Smith knew that what he asked Beardsley to say was untrue. There was no attempt to do this. Even though Smith might have thought that Cox was not known to Beardsley and did know, as a matter of fact, that Beardsley did not buy any cocaine from Cox, yet, on this indictment and the instructions of the court, Smith might still be found guilty. In other words we have only to look back to the fundamental. Smith could not be found guilty of an attempt to suborn, unless he would have been guilty of subornation of perjury if his attempt had met with success. Well, if he had succeeded he could not be found guilty here of subornation unless it should be shown by the record that he knew the facts not to be as he wanted them sworn to by Beardsley.

"Both the suborner and the suborned must, as elements of the offense, know the testimony to be false, and the former must be aware that the latter so knows it, otherwise there is not the needful corruption." 2 Bishop's New Crim. Law, sec. 1197; 2 Wharton's Crim. Law (10 Ed.), sec. 1329. The author cites *Coyne* v. *People* (Ill.), 7 A. S. R. 324, and *U. S.* v. *Evans,* 19 Fed. 912.

In the latter case it was said: "It (the indictment), avers that Burnett knew that these allegations were false, and it negatives them by averring what the facts were. It also avers that the defendant, when he procured Burnett to swear to these allegations, also knew that they were false. It does not aver that he knew that Burnett was aware of their falsehood. To sustain an indictment for procuring a person to commit perjury, it is obviously

necessary that perjury has, in fact, been committed. It cannot be committed unless the person taking the oath not only swears to what was false, but does so willfully and knowingly. He who procures another to commit perjury must not only know that the statements to be sworn to are false, but also that the person, who is to swear to them, knows them to be false; for unless the witness has that knowledge, the intent to swear falsely is wanting, and he commits no perjury. It is, therefore, essential that the indictment should aver, not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus the crime of perjury would be committed by him. The allegations of the indictment in this case are consistent with a belief on the part of the defendant that the party alleged to have been suborned supposed the statements he was expected to make to be true. In that case he would not be guilty of perjury, nor could the defendant be adjudged guilty of procuring him to commit perjury." It is held by the following authorities that the above averments are essential. Whar. Crim. Law, sec. 1331; *Commonwealth* v. *Douglas,* 5 Met. 241; *Stewart* v. *State,* 22 Ohio State, 477.

Geo. H. Ethridge, for appellee.

It is insisted that instruction number one for the state is erroneous, because it states to the jury that if they believe, beyond a reasonable doubt that Beardsley was a material witness in the case of *State of Mississippi* v. *Cox,* charged with the sale of cocaine, etc., that they should find him guilty. It is contended that it was not the province of the jury to determine the materiality of the testimony, but that, that is the function of the court alone. This statement is misleading. The court is the judge of the materiality of the evidence when it is offered in the case, but in a case of perjury, or an attempt to

procure testimony, one of the essentials of the offense is that the testimony upon which the perjury is assigned must be the materiality of the issue. The proof must show the materiality of the evidence in the case upon which the charge is predicated. It is not perjury to testify falsely to immaterial matters and the jury must find, among other things to convict, that the testimony attempted to be procured was material to some suit or inquest.

It is next insisted that the state's instruction does not tell the jury the quantity of proof necessary to convict and that it was not told that it required two witnesses or one witness with corroborating circumstances to convict. In answer to this criticism, I desire to say that the state is not under any obligation to ask any instructions at all. Section 1321 of the Code, does not require two witnesses or one witness with corroborating circumstances to convict. The rule is that the testimony of one credible witness is sufficient to sustain a conviction if the jury accept that testimony. The statute has in several cases, required additional proof but it has not done so in the offense defined by this indictment. The proof, however, furnishes the necessary provisions. The jury had all the evidence that could be required if the rule applied to this offense. The defendant could have asked an instruction on that proposition had it desired to have done so. It is certainly proven that the statement was made in the presence of Smith and several other witnesses, in which Smith was charged with having offered to pay two hundred dollars, if the witness would swear to certain things charged in the indictment. He did not deny the charge so made and his silence operates as an admission of the truth of the charge. This is proven by other testimony than Beardsley's.

SMITH, C. J., delivered the opinion of the court.

The first and second instructions to the jury granted by the court below at the request of the state permitted

the jury to convict appellant without it appearing from the evidence: First, that Cox had sold Beardsley cocaine; second, that Beardsley knew that Cox was the person who sold him the cocaine; third, that appellant knew that, in event Beardsley testified that he did not know who sold him the cocaine, he would be stating that which was false. That the state must prove these facts was ignored in the first and second instructions granted at the request of the state wherein the jury were charged to convict in event appellant sought to induce Beardsley by the offer of money to commit perjury by stating "that he did not buy cocaine from the said Cox and that he did not know said Cox."

Reversed and remanded.

POWELL *v.* BOARD of SUPERVISORS of TUNICA COUNTY.

[65 South. 499.]

1. DEPOSITORIES. *Public moneys. Trust fund. Unsecured excess. Creation. Qualification. Code* 1906, *section* 3485.

When the board of supervisors have elected a depository of county funds under the act of the legislature authorizing such depositories to be selected, and when the advertisement calls for bids for all of the county funds and fixes the amount of security to be given, and when the bid accepted is for all of the county funds and the security required by the advertisement is given, and when the order of the board awards all of the county funds to the successful bidder, there being at that time less than the amount of the security with ten per cent off, on deposit, and afterwards the board permits the depository to have in its hands a greater amount of public funds than it has security for, Code 1906, section 3485, providing that public moneys deposited in a bank shall constitute a trust fund and not be liable to be taken by creditors of the bank, applies to such excess, though not to the funds secured; the excess being received into the bank, not in its capacity as a depository, but simply as a bank receiving public funds.

2. DEPOSITORIES. *Creation. Qualification.*

The selection of a bank does not complete its creation as a county depository. This is only accomplished by the depositing of the securities, which is followed by the issuance of a commission showing its qualification as a depository to receive and disburse funds in amount not exceeding a sum stated.

APPEAL from the chancery court of Tunica county.

HON. M. E. DENTON, Chancellor.

Petition by the board of supervisors of Tunica county against W. H. Powell, receiver of the Bank of Tunica, praying that the claim be declared a trust fund payable to the county and given a first preference lien. From a decree for the county, the receiver appeals.

The facts are fully stated in the opinion of the court.

Montgomery & Montgomery, for appellant.

There is only one question presented by this appeal, to wit: When the board of supervisors have elected a depository of county funds under the act of the legislature authorizing such depositories to be selected and when the advertisement calls for bids for all of the county funds and fixes the amount of security to be given, and when the bid accepted is for all of the county funds and the security required by the advertisement is given; and when the order of the board awards all of the county funds to the successful bidder, there being at that time less than the amount of the security with ten per cent. off, on deposit and afterwards, the board permits the depository to have in its hands a greater amount of public funds than it has security for, whether section 3485 of the Code of 1906 applies to the excess.

As will be seen by the notice published by the order of the board and by the commission issued by the president of the board to the depository in this case, the board dealt with the election of this depository at the January meeting, 1913, as if it were acting under chapter 137 of the Laws of 1910, when in fact the board was really

acting under authority of chapter 194 of the Laws of 1912, page 208, which is a substitute for the Law of 1910.

However, as we conceive in all material particulars, so far as the question raised here is concerned, the two acts are the same. Certainly so, as to those parts which are necessary to be referred to in this argument. In section 1 of each chapter, it is provided, in effect, though not in the same language, that the public funds of the several counties in the treasury shall be kept on deposit in the state or National Bank, or some of them doing business in the several counties, and in the suceeding section, it is mandatory that the board of supervisors shall elect this depository in the manner provided by law. In section 7 of the Act of 1910 and in section 8 of the Act of 1912, it is required that the tax collector of each county shall pay the amount due the county by him to a county depository if there be one, so that neither the county treasurer, nor the tax collector, nor the sheriff, has any option in the matter, but must pay the money of the county into the county depository elected for all of the county funds. This being done, the petition in this case and the exhibits thereto show that this was done.

The proof shows that when this depository was elected in January, 1913, there was on deposit with the county treasury, of money belonging to the county, less than forty-five thousand dollars, which money was all in the Bank of Tunica at that time; that Bank having been elected the county depository the year before at a rate of interest of four per cent. per annum on average daily balances. That at the January meeting, 1913, the Bank of Tunica had opposition. The Planters Bank of Tunica having put in a bid for the county money at five per cent. per annum on average daily balances. The Bank of Tunica bid as high as six per cent. per annum on average daily balances and was elected the depository at six per cent. per annum on average daily balances, because it was the highest rate of interest offered.

It is not disputed that the order of the board and the notice given by the order of the board required the depository to deposit with the clerk of the board fifty thousand dollars in securities and that this was done by this bank. That the securities were received to the amount of fifty thousand dollars, there being then less than forty-five thousand dollars on hand. That the order of the board elected the Bank of Tunica as the depository for all of the county funds for that year.

It is not disputed that the Bank of Tunica was the sole depository. That all of the money coming into the hands of the tax collector and sheriff of the county and the county treasury was deposited with the Bank of Tunica up to the time of the failure of that bank, in April, 1913, and that this was with the knowledge and consent of the board of supervisors, cannot be doubted for a moment from this record. Yet the contention of the board of supervisors is that because the members of that board neglected to do their duty in this: That they did not see to it that sufficient security was given for the protection of the county funds, that for this reason, the depositors whose money was in the Bank of Tunica at the time of its failure, must lose and the county must be permitted to claim and receive twenty-one thousand dollars as a preference claim because of the failure of the board of supervisors to require and take sufficient security for the deposit.

It was settled in the case of *Shields* v. *Thomas,* 71 Miss. 260 that the public funds on deposit in a bank were not a preference claim over the general creditors of the bank as far as the assets of the bank were concerned, but could only be collected as a preference claim in case it could be proven that the funds deposited form a part of the general assets of the bank. *Fidelity & Guaranty Co.* v. *First State Bank of Shaw,* 103 Miss ——; *Fogg* v. *The Bank of Friars Point,* 80 Miss. ——; *Metcalf* v. *Bank,* 89 Miss. 649; *Commercial Bank* v. *Hardy,* 97 Miss. 755; *Green* v. *Cole,* 98 Miss. 67.

We come now to the proposition which we are contending for and the only question in this case, to wit: That the statute, section 3485 of the Code of 1906, has no application to the case at bar. The board of supervisors, acting under authority of chapter 194 of the Laws of 1912, which is a substitute for chapter 137 of the Laws of 1910, elected the Bank of Tunica as the depository for all the funds of Tunica county and made a contract with it accepting the bid of the bank, not for a part of the county's money, but for all of it, for that is what the advertisement called for bids for; that is what the bank made a bid for and that is what the order of the board of supervisors accepting that bid at six per cent. interest on average daily balances appointed the bank for. And under section 3 it is required that there shall be placed on deposit with the county treasurer certain securities in the sum of ten per cent. greater than the maximum amount to be placed on deposit in any such bank of the county at any one time.

This bank having bid for all the county funds and having been elected the sole depository, it simply complied with the order of the board of supervisors as to what amount of security it should give. It is true that the commission issued to the bank, said that there would not be on deposit more than forty-five thousand dollars at any one time, but this commission, as we submit, in no way interferes with the fact that the bank had been elected the sole depository for all the county funds and we submit that it was the duty of the board to see, later, when the amount on deposit had exceeded the security, that the bank should give further security; and that by electing the bank the sole depository at the rather extravagant rate of interest contracted for, it became the sole depository for all of the funds and the tax collector had no right to handle the money coming into his hands belonging to the county except under the provisions of that act. In fact, the tax collector was not supposed to know what the total amount on deposit in the depository

was. It was his duty to pay all the money coming into his hands as tax collector belonging to the county, into the county depository, if there was one, as there was, receiving triplicate receipts for the same; mailing to the chancery clerk and treasurer, each, a copy of the same and as a matter of fact, the tax collector may not have known, nor was it his duty to know, what the total amount at any one time on deposit in the bank really was.

The case of *Potter* v. *Fidelity & Guaranty Co.*, 101 Miss. 823, is a case in point, as we submit, with the question that we are now discussing: In that case, the following principles are announced: (a) In the absence of statutory or constitutional authority, the state, as sovereign, has no preferential rights in Mississippi. (b) State sovereignty is not involved when the question is one of priority merely. (c) Section 3485 of the Code of 1906, being in derogation of the common law, is to be strictly construed against the state asserting a claim by virtue of that statute. (d) While section 3485 of the Code of 1906, was not repealed by the depository law, and still stands, as security for all deposits of public money made by any person whatever in case of the insolvency of the depository, where the deposit is not made by virtue of the depository law, still where the state disposes itself of its public funds, as required by its depository laws, the relation of debtor and creditor is established between the state and the depository merely, and the state must make its money, in the event of the insolvency of the depository, out of its security, and failing in this, must share the assets *pro rata* with the other creditors. (e) When funds are placed by the state in a depository, as provided by the Laws of 1908, chapter 96, they are not trust funds within any meaning or purpose provided for by section 3485 of the Code of 1906.

Geo. H. Ethridge, for appellee.

I think that the action of the chancellor was correct in allowing the claim of the board of supervisors and mak-

ing it a preference claim over the general creditors of the bank and that this contention is sustainable without reference to the soundness of the decision in the case of *Potter* v. *Fidelity Deposit Company,* 101 Miss. 823, 58 So. 713, and secondly, if mistaken on this proposition, that the deposit in the bank was a preference claim under section 3485, of the Code, and if necessary to sustain the decree of the chancellor, the court should modify or overrule the Potter case.

Under chapter 194, Laws of 1912, the county funds are directed to be placed and kept in a state or National Bank doing business in the several counties on condition that the bank will qualify as a depository and bid not less than two per cent. upon the average daily balances upon the funds of the county in the county depository, and where more than one bank in a county qualify as a depository, the board of supervisors shall have the right to designate which and how much of any fund shall be kept on deposit in any one depository and adopt regulations for using such deposit.

By section 2, of the act, the board is directed, at the December meeting in each year, to give notice to all banks in their counties, by publication, of the provisions of the act, and that at the January meeting, or some subsequent meeting the board will receive proposals which the banks may make for the privilege of keeping the county funds or any part thereof, and the security proposed, and provides that the county funds to be deposited in the banks proposing the best terms, having in view the safety of the funds and the terms made each depository.

Section 3 provides as to how a bank shall qualify as a county depository which is by placing in deposit with the county treasurer as securities in an amount ten per cent. greater than the maximum sum to be placed on deposit in such bank at any time, and states further the kind of securities that may be so deposited.

Sections 4 and 5 provides for a commission, the form of which is prescribed by statute, and one of the provi-

sions of this commission provides "but shall not have on deposit at any time an amount exceeding the sum of $——" When any county funds are paid into the depository, the depository is required by section 6 of the act, to make out triplicate receipts, specifying the accounts on which the payment is made, one receipt to be sent to the county treasurer and one to the chancery clerk.

Section 7 of the act, provides for quarterly reports at the regular January, April, July and October meetings, and such other times as the board may require. Section 8 provides how the tax collector shall settle with the county depository.

Section 10 provides that in case of failure to pay any warrant lawfully issued on any funds on deposit belonging to the county in such depository, that the county treasurer shall sell the securities placed with him or so much as may be necessary to cover back into the county treasury the amount of county funds on deposit with such depository with accrued interest thereon and that the sales of such securities shall be made by the county treasurer at the best price he can obtain either at public or private sale. And in the event of the failure to pay warrant, where the depository has placed security bonds, the treasurer shall notify the president of the board of supervisors who shall take such action as he may deem best and most expedient for the recovery back into the treasury of the county money on deposit in such depository, and he is authorized to employ counsel if necessary, and in addition to the rest, that the depository shall be liable for damages at the rate of one cent per month for any delay in paying over the county funds when lawfully demanded and the bond of the depository shall be liable for said expenses and damages.

Section 11, of the act, makes the traffic in public funds by the county treasurer or tax collector, or any officer, a felony. And section 12 provides the penalty for failure to comply with the provisions of the act.

It will be seen from a review and a careful study of chapter 194, of the Laws of 1912, that it is clearly contemplated that the money deposited is county money and that it shall be available at all times for the use of the county in meeting the demands of its ordinary business.

There is nothing in the entire chapter inconsistent with the provisions of section 3485, of the Code. I respectfully submit that where a depository files only a certain security and where its commission, which is provided by statute, limits the amount to a designated sum, that any sum of money placed in the depository, by any officers, stands in the same relation that it would had the depository never qualified at all. In other words, a bank can only be a depository of the county funds when it has complied with the law by placing the necessary security.

There is no sound reason in saying that when the state or the counties deposit their money in the bank that they waive their right to priority. They had the right of priority and that right is not either in terms or by any fair implication except out of the law when the depository is created and provided for. There is no inconsistency or conflict in the terms of the two statutes. In my judgment, this statute, section 3485, is not to be construed on the principle that it is in derogation of common right. It is rather to be construed as a remedial statute, for the preservation of the rights of all the people as against the rights of a few. It becomes more important to preserve this right of priority since the public money is to be placed in the banks and it should not be construed in such a way as to make the depository law an unfavored law. If, in the present case, the people of Tunica county, cannot recover their money for the use of the county and if that example is followed by and occurs in other counties as it does and will occur in all times of financial disaster, there will be a clamor raised for the repeal of the law and the money would again be withdrawn from the channels of commerce and trade and be locked up in the vaults of the several counties for long intervals of time.

It must be remembered in this connection that the state and counties, in placing the public money in the banks, are not actuated by business purposes and are not influenced in any great degree by any interest consideration. The rate of interest provided by law in a depository is much less than the minimum interest rate under general contracts. I think the ruling of the courts in the former cases of *Green* v. *Cole,* 98 Miss. 67, 54 So. 65; *Bank* v. *Hardy,* 87 Miss. 755, 53 So. 395; *Fogg* v. *Hibdon,* 80 Miss. 750, 32 So. 285 are much stronger in their reasoning and on principle than the case of *Potter* v. *Fidelity & Deposit Company.* The learned chief justice, in the latter case, seemed to proceed upon the idea that the legislature's purpose was to make a modification of section 3485, of the Code. There is nothing in my judgment, to indicate that the depository laws intend to make a complete act concerning the public funds and their use and management. If such constructions were sound, the legislature should have repealed all the other provisions bearing upon the matter.

Wilson & Armstrong, for appellee.

The deposit by the sheriff and tax collector and by the county treasurer of public funds in a bank without express authority of law, creates the bank trustee *ex maleficio,* for the county, and such public funds are trust funds for which a preference lien and charge is created upon all the funds and assets of the bank. Code 1906, section 3485; *Fogg* v. *Bank,* 80 Miss. 750; *Metcalf* v. *Bank,* 89 Miss. 649; *Commercial Bank* v. *Hardy,* 53 So. 395; *Green* v. *Cole,* 98 Miss. 67; *Potter* v. *Fidelity & Deposit Co.,* 101 Miss. 823.

While the tax collector and treasurer are authorized to deposit public funds in the bank selected as depository, this authority ceases whenever the bank has on hand an amount within ten per cent. of the security deposited by it. This limitation of the amount to be held by the bank

at any one time is fixed by law, notice of which is given in the commission issued to the depository bank, and an account of which is kept by the county auditor, and this authority for such deposit can only be granted upon the issuance of a pay warrant by the county auditor, who had the amounts that have been placed in the bank, as well as the withdrawals by him, shown on his books. Chapter 194, Acts 1912, page 208, sections 3, 4, 6 and 8.

The authority to deposit in a bank, given to the tax collector and treasurer, is limited to ninety per cent. of the security of such depository shown by commission to such depository. Whenever the depository or depositories have on hand the full amount that they are authorized to receive, then the officers have no right to pay the money to the depository, nor has the depository any right to receive it. Such reception by the depository is unlawful, and it holds the money as a trustee for the county, and in that case, section 3485 has full application.

The Bank of Tunica was duly selected county depository. It qualified to the extent only of forty-five thousand, four hundred, fifty-four dollars and fifty-five cents, to be exact. Its commission limited it within that amount, as the law required. It was a depository to only that extent. When it had that much money, it was no longer qualified as county depository, and stood like any other bank, until it gave further security. Any excess was beyond its authority to receive, of which it had knowledge, and for any excess, it stood the same as any other bank, and was chargeable with the money as a trust fund. Chapter 194, Laws 1912; *Potter* v. *Fidelity & Depository Co.*, 101 Miss. 829; *Yellowstone County* v. *First Trust & Savings Bank* (Mont.), 128 Pac. 596; *Bartley* v. *Meserve Re. State Treasurer's Settlement,* 51 Neb. 116, 36 L. R. A. 746, 70 N. W. 532.

REED, J., delivered the opinion of the court.

The Bank of Tunica was selected as the depository of the county of Tunica for the year 1913. We quote from

the order made by the board of supervisors on January 6, 1913, accepting the bank's bid, approving its securities offered, and directing the issuance of a commission to it, as follows:

"It is therefore ordered by the board that the said bid of said bank of Tunica as depository of all funds of Tunica county be and the same is hereby accepted, and said bonds above mentioned are hereby approved, and said depository shall account for and pay interest to the said county of Tunica on any daily balances of all funds of said county deposited with it during the year 1913 in the manner as provided by law."

It appears that the notice to create a depository was given by the board of supervisors in accordance with chapter 137 of the Acts of 1910, and the commission was directed to be issued as provided for in that law. However, in this appeal, counsel for appellant and appellee treat and consider chapter 194 of the Acts of 1912, which was enacted to take the place of chapter 137 of the Laws of 1910, and to be the law of the state for the establishment of county depositories, as applicable in this case.

The commission issued to the Bank of Tunica after stating that the bank had complied with the requirements of the law, by giving the several securities placed with the county treasurer, being for the total amount of fifty thousand dollars, declares that:

The bank "is hereby created and appointed depository of the county of Tunica for the balance of the term ending the 31st of December, 1913, and is hereby authorized and empowered to receive and disburse, according to law, any and all county funds there offered for deposit, but shall not have on deposit at any time an amount exceeding forty-five thousand dollars, the said depository agreeing to account for and pay interest at the rate of and in the manner provided by law for the use of the county funds there kept on deposit."

The Bank of Tunica failed on April 28, 1913, and became insolvent. Thereafter, W. H. Powell, appellant,

upon a general creditors' bill, was appointed by the chancery court receiver of the bank and is engaged in administering its affairs having charge of all of its assets and undertaking the payment of its debts.

At the time of the failure there was on deposit in the bank the public funds of the county to the amount of seventy-one thousand, nine hundred, twenty dollars and fifty-two cents. The board of supervisors of Tunica county, on August 12, 1913, filed a petition in the chancery court setting out all of the facts relating to the creation of the county depository and the depositing of the county funds therein, alleging that the excess of twenty-one thousand, nine hundred, twenty dollars and fifty-two cents over the security given for fifty thousand dollars was an unsecured sum in the bank, and praying that the claim for this excess be established and declared a trust fund payable to the county, and:

"That a first preference lien and charge be fixed upon all the assets of said bank and all proceeds thereof on hand, or which may come into the hands of the receiver, and that he be directed to pay said sum and interest before paying any other creditors."

An answer was filed by the receiver, denying that the county was entitled to any preference over other creditors of the bank or had any rights to the assets of the bank superior to those of other creditors. The receiver also claimed in his answer that the county had deposited all of its funds in the bank as the sole qualified depository under the law therefor; that the funds thereby became assets of the bank as other sums borrowed by it; that the relation of debtor and creditor merely then existed; that the county must recover its funds in the event of insolvency out of the securities; and that, failing in this, it must take its place in the line of general creditors and share its assets pro rata with them.

The chancery court, by its final decree, sustained the contention of the county and declared the amount in the

bank in excess of the securities given to be a prior and preference charge against all funds and assets in the hands of the receiver and administered in the court subject to the payment of proper costs and expense in administering the estate. From this decree the present appeal has been prosecuted.

Counsel for appellant in beginning their brief say:

"There is only one question presented by this appeal, to wit: When the board of supervisors have elected a depository of county funds under the act of the legislature and authorizing such depositories to be selected, and when the advertisement calls for bids for all of the county funds and fixes the amount of security to be given, and when the bid accepted is for all of the county funds and the security required by the advertisement is given, and when the order of the board awards all of the county funds to the successful bidder, there being at that time less than the amount of the security with ten per cent. off, on deposit, and afterwards the board permits the depository to have in its hands a greater amount of public funds than it has security for, whether section 3485 of the Code of 1906 applies to the excess."

Section 3485 of the Code reads:

"Public moneys are trust funds.—All money deposited in bank, or with any other depository, by or for a tax collector, or other officer having the custody of public funds, state, county, municipal, or levee board, whether the same be deposited in the name of the officer as an individual or as an officer, or in the name of any other person, is *prima facie* public money and a trust fund, and is not liable to be taken by the general creditors of the officer or by the creditors of the depository."

It is beyond question in this state that, independent of the depository law, a county has a preference claim against all assets of a bank for public funds on deposit therein, and that such funds are trust funds for which this preference is given. *Fogg* v. *Bank,* 80 Miss. 750, 32

So. 285; *Metcalfe* v. *Bank,* 89 Miss. 649, 41 So. 377; *Green* v. *Cole,* 98 Miss. 67, 54 So. 65; *Potter* v. *Fidelity & Deposit Co.,* 101 Miss. 823, 58 So. 713.

We do not see, in the present law, chapter 194 of the Acts of 1912, providing for the establishment of a county depository anything inconsistent with the provisions of section 3485 of the Code of 1906. The plan of the legislature in authorizing the establishment of county depositories has for its purpose the providing of security for the county public funds. Such funds when secured in such depository do not need to be protected by section 3485. Therefore section 3485 will not operate to provide a preference charge on funds secured in a depository. This, in effect, was decided in *Potter* v. *Fidelity & Deposit Company.* In that case Chief Justice MAYES, delivering the opinion of the court, said:

"Section 3485 was not repealed, or intended to be repealed, by the Laws of 1908. Section 3485 still stands as security to the state for all deposits of its money made by any person, in case of the insolvency of the institution where the deposit is made, in all cases where any deposit is not made by virtue of its authority as evidenced by the depository law of 1908."

The funds of the county in the depository bank to the amount of the security, fifty thousand dollars, were thereby secured funds and not protected by section 3485. The bank was created and appointed a depository of the county, for the term, to receive and disburse according to law funds offered for deposit, but with the express prohibition that the bank should not have on deposit at any time an amount exceeding forty-five thousand dollars, which was intended to be ten per cent. less than the total amount of the securities placed, fifty thousand dollars. The bank was the qualified county depository for all county funds up to the amount fixed by the board of supervisors when establishing it the depository. It could not be the depository except as authorized by the statute

and the order of the board in compliance therewith. The authority is shown by the commission issued to the bank.

The very purpose of the legislature, by the enactment of the law for the establishment of county depositories, was to provide for the safe-keeping of the county funds. The safety of the funds is to be secured by the placing on deposit with the county treasurer, securities in amount ten per cent. greater than the maximum sum to be on deposit in the bank at any one time. Under the plan, the board of supervisors may arrange for the depositing of the county funds in more than one bank. If two banks were selected and made depositories, then each bank would be a depository to the amount fixed in its contract or arrangement with the board.

It is surely a proper interpretation to put upon the statute to say that a bank selected as a depository is only such depository, authorized by law to receive deposits of county funds, in the amount to which it qualifies by the deposit of securities. Therefore county public funds received into the bank up to the amount for which it has qualified are received and held by the bank as a county depository. When the full amount for which the bank has qualified has been reached, then any other funds will be received into the bank, not in its capacity as depository, but simply as a bank which is not a county depository receiving public funds. Such excess funds will come under the protection of section 3485. They are funds unsecured, deposited in the bank without authority given in the statute, and by virtue of the order of the board of supervisors following the directions of the statute, and which authority is to be expressed in the commission issued to the bank. They are trust funds and are not liable to be taken by the creditors of the depository.

We note the argument made by counsel for appellant that, as the board of supervisors selected the Bank of Tunica as the sole depository for all of the county funds, the county has itself disposed of its public funds as re-

quired by the depository laws, and the relation of debtor and creditor is thereby established between the bank and the county; and that, in the event of insolvency, the county must realize out of its securities taken, and, failing in this, must share the assets *pro rata* with other creditors; but we do not see that this will avail appellant in this consideration.

The selection of a bank does not complete its creation as a county depository. This is only accomplished by the depositing of the securities, which is followed by the issuance of a commission showing its qualification as depository to receive and disburse funds in amount not exceeding a sum stated. The Bank of Tunica, elected county depository for all funds, only qualified for a definite amount. It is not a question of election but of qualification. A bank may be elected, and still never qualify by depositing the securities.

We do not see that the protection of the excess funds by the operation of section 3485 will be prevented by the board's permitting the depository to have in its possession a greater amount of funds than the bank had qualified for. This is a suit by the county. The rights of the county are sought to be enforced, not those of the board. In the case at bar the failure of the board to keep informed as to the amount of funds in the bank and to prevent the sum being in excess of the proper amount will not affect the county's rights; for the bank knew the amount on deposit and knew whether it had exceeded the amount it was authorized to receive under its commission. It acted wrongfully in receiving such excess amount. It became a trustee under the law holding such funds not simply as a debtor, but as a trustee.

We conclude that the chancellor did not err in his decree and that the amount of the county funds deposited in the bank in excess of the sum in which the bank qualified as depository is protected by section 3485.

Affirmed.

ROUSE v. STATE.

[65 South. 501.]

WITNESSES. *Cross-examination. Bias or interest.*

It is elementary law that a witness may be examined as to his bias or interest in the case in which he is testifying and where a witness for the state on trial for the unlawful sale of liquor, testifies that he had a little interest in the case and had been indicted for selling whiskey it was reversible error to exclude on cross-examination a question whether he had an understanding that if he would testify against the accused he would not be prosecuted.

APPEAL from the circuit court of Harrison county.

HON. J. I. BALLENGER, Judge.

W. Rouse was convicted of unlawful retailing, and appeals.

The facts are fully stated in the opinion of the court.

E. A. McCoy and *J. L. Taylor,* for appellant.

The record shows that the only witness giving testimony that would have any bearing on the case at all, was Edward Saucier, and his testimony is not positive. He did not know how much he paid for the whiskey, and stated that nobody was present when he bought it, and was not positive, but thought he got it from his barn, and on being asked the question "Had you ever bought any from him before that time," answered, "I think I might have bought it once before," but did not remember and would not say; and so his testimony was not positive on direct examination; on his cross-examination he admitted that he had "a little interest," and on being asked what was that interest, answered "the grand jury last year found a bill against me for selling whisky, and I turned it up that I got whisky from Mr. Rouse." It

further appeared that his interest consisted in trying to get himself out of trouble.

The court sustained an objection to the question whether or not there was an understanding, if Saucier would testify against Rouse, that he (Saucier) would not be prosecuted any further; and we submit, on cross-examination, the defendant had a right to search the witness, and to know what interest he had in testifying, as it did appear from his testimony that he had an interest, and as to whether or not he was promised immunity if he would testify, so that the jury might have known what manner of man was giving testimony and his interest in the matter, as it must have been that they found the defendant guilty on the testimony of Saucier alone, for other witnesses knew nothing of the alleged sale of intoxicating liquor, as will appear from their testimony.

Ross A. Collins and *E. H. Green,* for appellee.

The law of the case was correctly given in the instructions for the state and the defendant. There was no objection to any of the testimony offered by the state and all the testimony for the defendant was admitted. There was a conflict of evidence as to the guilt of the defendant and upon this issue of facts the jury found the defendant guilty as charged and the sentence of the court was very lenient. Upon an issue of fact, where the law of the case is correctly and properly given, the jury is better able to reach a just verdict than an appellate court which can only draw its conclusions from the printed record.

From the testimony disclosed in this record there can be no doubt of the guilt of this appellant and I, therefore, submit that the case should be affirmed.

COOK, J., delivered the opinion of the court.

Appellant was convicted on a charge of selling intoxicating liquors. The only witness for the state testifying

to the sale of liquor was one Edward Saucier. This witness said he had a "little interest" in the case, and in response to the question, "What did that consist of?" he replied, "The grand jury last year found a bill against me for selling whisky, and I turned it up that I got the whisky from Mr. Rouse." Counsel for defendant asked the witness this question, "Haven't you an understanding, if you will testify against Mr. Rouse, you will not be prosecuted?" To this question the district attorney objected, and the court sustained the objection and would not permit the witness to answer.

It is elementary law that a witness may be examined as to his bias or interest in the case in which he is testifying. It was certainly pertinent to inquire into the motives of the witness for the state, especially as the defendant testifying denied that he had sold whisky to the state's witness. It does not appear upon what grounds the objection to the question was based—merely an objection to the question and a ruling of the court sustaining same.

The court erred in its ruling, whatever may have been its reasons for same, and the case will be reversed and remanded.

Reversed and remanded.

SKERMETTA v. STATE.

[65 South. 502.]

INTOXICATING LIQUORS. *Sales. Acts constituting.*

A boarding house keeper who serves wine to his guest with their meals without extra charge for the wine is guilty of the unlawful sale of intoxicating liquors.

APPEAL from the circuit court of Harrison county.
HON. J. I. BALLENGER, Judge.

John Skermetta was convicted of the unlawful sale of intoxicating liquors, and appeals.

The facts are fully stated in the opinion of the court.

Mize & Mize, for appellant.

Ross A. Collins and *J. M. Vardeman,* for appellee.

COOK, J., delivered the opinion of the court.

Appellant is an Austrian and resides at Biloxi. The home of appellant seems to have been headquarters of the Austrian boatmen visiting the port of Biloxi. It seems that the officers of the law had been watching the home of appellant for some time, and had observed that card playing had been engaged in by appellant and his guests, who were, in the main, also Austrians. One of the officers testified that he saw appellant and his guests gambling, and, while gambling, they were drinking wine. However, we think the officer meant to say that he saw them playing cards and drinking, and merely assumed that they were gambling.

Following the espionage of the officers, a raid and search was made. In an outhouse, or warehouse, on the premises was found two casks of beer and one cask of wine; in the ice box in the dwelling several dozens of bottles of beer were found.

The record seems to establish that the beer and wine were not kept with the intention of selling same in the ordinary sense. There seems to be no reason to doubt that the beer did not belong to appellant. The cask of wine did belong to appellant and was kept for his own use and for his boarders. The record shows that appellant had three boarders to whom was served wine at dinner, for which board they paid seventy-five cents per day. It is insisted, however, that no extra charge was made for the wine, but it appears that the wine was a part of the dinner.

It is the contention of appellant that he was merely following the habit of a lifetime, and that in Austria wine

formed a part of every dinner as a matter of course and as a universal custom. His boarders were also Austrians, and, from the evidence, we conclude that to the boarders a dinner without wine would not deserve the name of dinner.

Upon this state of facts the trial court granted the following instruction to the jury, at the request of the state, viz.:

"The court instructs the jury for the state that if they believe from the evidence, beyond a reasonable doubt, that the defendant kept in his possession wine or beer to be served at his table, and that he did serve beer or wine at his table to a boarder or boarders, who paid him seventy-five cents per day for such board, then the defendant is guilty, and the jury should so find."

The defendant asked this instruction, which was refused, viz.:

"The court instructs the jury that the fact that the defendant served wine with his meals, if he did not charge for the wine, extra, he violated no law so far as serving the wine was concerned."

It is said that the instruction granted for the state amounted to a peremptory instruction, and was error.

In *State* v. *Lotti*, 72 Vt. 116, 47 Atl. 392, the court said:

"The respondent kept a boarding house, with sixteen boarders and lodgers and two or three boarders. At dinner and supper he furnished them with ale and wine, and they were accustomed to drink it. The boarders and lodgers paid the respondent sixty cents per day for their board and lodging. The furnishing of the ale and wine by the respondent to his boarders, as a part of their meals, was in effect a sale to them of so much ale and wine as they drank, and the keeping of it by the respondent for that purpose was unlawful. The case is not within section 4462, V. S., providing that the words 'give away,' as used in chapter 187 V. S., shall not apply to the giving away of liquors by a person in his private dwell-

ing. The question was whether the transaction was a sale, not a gift, and the case was submitted upon the ground that the ale and wine were furnished for pay as a part of the meals. There was testimony to support the claim, the charge was correct, and the verdict must stand. If a 'person in his private dwelling' furnishes a man his dinner, and with it, and as a part of it, intoxicating liquors, and receives pay for it, such transaction is a sale of the liquor so furnished."

The rule announced in the foregoing opinion is supported by *State* v. *Intoxicating Liquors,* 44 Vt. 208, and by *Nicrosi* v. *State,* 52 Ala. 336.

It seems to us that the cases just quoted correctly announce the law, and, so believing, we think the trial court did not err in granting the instruction for the state and refusing the one requested by defendant.

Affirmed.

DAVIS *v.* BLUMENBERG.

[65 South. 503.]

1. APPEAL AND ERROR. *Presentation for review. Administratrix's accounts. Exceptions. Executors and administrators. Accounting. Premium on bond. Allowances. Payment of Taxes. Valuation by appraisers. Partnership debts. Claims against estate. Sufficiency of certificate.*

Where exceptions filed to the account of an administratrix *de bonis non,* present a question of fact and not simply one of law, the party presenting the exceptions to the supreme court for review should set forth in his brief each exception upon which the opinion of the court is desired, followed by a brief statement of the reason why the exception should be sustained or overruled and a citation to the pages of the record containing the evidence relative to the item excepted to.

2. EXECUTORS AND ADMINISTRATORS. *Accounting. Premium on bond. Allowance.*

A premium paid by an administratrix *de bonis non*, on a special bond executed by her in order to collect the money for which land had been sold by her predecessor, by order of the court, should be allowed, where such bond was not only necessary but had been approved by the court.

3. EXECUTORS AND ADMINISTRATORS. *Payment of taxes. Allowances.*

Where taxes paid by an administratrix on land belonging to the estate constituted a personal debt against the owners thereof as well as a lien on the land, she was entitled to an allowance therefor on an accounting.

4. ACCOUNTING. *Valuation by appraisers. Conclusiveness.*

An administratrix on accounting, is chargeable for the actual value of property which has come into her hands, rather than for a less value fixed by the appraisers.

5. EXECUTORS AND ADMINISTRATORS. *Accounting. Partnership debts.*

An administrator should be allowed credit for the payment of debts due by a firm of which deceased was a member, where it appears that the assets of the firm, upon the death of deceased, were turned over to his administrator and that the payments were made out of the proceeds thereof.

6. CLAIMS AGAINST ESTATE. *Sufficiency of affidavit.*

Where the affidavit to a claim in favor of a partnership is probated against an estate, the fact that such affidavit fails to show that the affiant is a member of the firm, does not render the payment of the claim improper, if such affiant is in fact a member of the firm.

7. CLAIM AGAINST ESTATE. *Allowance. Sufficiency of certificate.*

Where the certificate of the clerk to claims probated against an estate, was not in the language of section 2106, Code 1906, in that it omitted the word "probated," this did not invalidate it, where in all other respects the statute had been complied with by the person presenting the claim; the word "probated," means merely that the claim has in the judgment of the clerk been proven in the manner required by law, and the omission being immaterial, since the fact that the clerk has allowed and registered the claim shows that he decided that it had been proven.

8. EXPENDITURES. *Payment of taxes. Allowances.*

It was proper to allow the administrator credit for taxes paid by him on lands belonging to decedent at the time of his death,

where such payment was not only properly made to protect the administrator and decedent's creditors in their right to subject the land to the payment of debts, but inured equally to the benefit of all heirs of decedent.

APPEAL from the chancery court of Leflore county.

HON. M. E. DENTON, Chancellor.

Exceptions were filed to the account of Mrs. Kate Blumenberg, as administratrix *de bonis non,* by H. H. Davis, and others and both sides except to a decree entered on the report of a commissioner to whom the account was referred.

Fred Blumenberg died intestate in 1905, leaving surviving him, as his only heirs at law, his brother, J. S. Blumenberg, and the children of a deceased sister, whose husband was H. H. Davis, the father and next friend of said minor children.

At the time of the death of Blumenberg, he owned large tracts of land in Leflore, Attala, and Grenada counties, and some personal property in Leflore county, consisting partly of money and partly of life stock and farming implements. His brother, J. S. Blumenberg, who inherited an undivided half interest in his estate, was appointed administrator and proceeded with the administration of the estate and the operation of the property. A large number of claims were probated against the estate, and it became necessary to sell a part of the realty in order to pay them. In the meantime the administrator operated the plantation property for several years, and before a deed was executed to the land sold, and before the lien for purchase price was discharged and other debts paid, J. S. Blumenberg died, and his wife, Mrs. Kate Blumenberg, was appointed administratrix *de bonis non.* She made a bond with a surety company and consummated the sale of land and collected the purchase price thereof. She rendered an accounting to the court, and appellants filed exceptions to her account, and it was referred to a commissioner,

who restated the account and filed his report, to which the appellants still excepted, whereupon the court entered a decree disallowing certain items of said report, to which appellee excepted, and affirmed the report as to other items, to which appellants excepted.

Watkins & Watkins, Monroe McClurg and *Roane & Roane,* for appellants.

Guin & Mounger and *E. V. Hughston,* for appellee.

PER CURIAM. Most of the items of the accounts of the administrator and of the administratrix *de bonis non* were objected to by appellants, and a commissioner was appointed to restate the accounts, and, upon the coming in of his report, it appeared that most of the items of the account, as restated by him, were again objected to by appellants, and that objections had also been interposed by the administratrix to the disallowance by the commissioner of certain items of the accounts. All of these exceptions are presented to us for review.

The only way this court can intelligently pass upon matters of this character is for counsel representing the party presenting an exception to us for review to set forth in his brief each exception upon which the opinion of this court is desired, followed by a brief statement of the reasons why the exception should be sustained or overruled, and by a citation to the pages of the record containing the evidence relating to the item excepted to. It is, of course, unnecessary to do this, where the exceptions present no question of fact but simply one of law. This plan has not been pursued with reference to some of the exceptions presented to us by this record, and we will therefore not attempt to deal with those not so presented, and must be understood as expressing an opinion only on those matters herein specifically referred to. We find no error in the reduction of the first administrator's fees from seven to four per cent.

The seventy-three dollars and thirty-five cents premium paid by the administratrix *de bonis non* on the special bond executed by her in order to collect the money for which the land had been sold by her predecessor by order of the court below should have been allowed. It was necessary for her to make this bond, and in addition it had been approved by the court.

Exception to the item of four hundred and sixty-six dollars and thirteen cents paid by the administratrix for the taxes on the land for the year 1909 should have been overruled, and she should have been allowed credit therefor, because, if for no other reason, the taxes on the land constituted a personal debt against the owners thereof, as well as a lien on the land, and appellants therefore have no cause of complaint because of the payment by the administratrix thereof.

A number of mules, the property of the decedent, came into the hands of the administrator and were not accounted for by him. Evidence was introduced showing that these mules were worth more than the value placed on them by the appraisers, and the court below very properly charged him with the actual value, as shown by the evidence, and not that fixed by the appraisers.

On the showing made, the allowance made the administratrix for attorney's fees seems to be excessive and should be reduced to an amount commensurate with the services shown to have been rendered.

No error was committed in the allowance of the item of four hundred and fifty dollars to J. S. Blumenberg for board of the decedent's mother prior to his death. It seems clear from the evidence that this lady was staying with Blumenberg under an agreement or understanding with the decedent that decedent would pay her board. At all events, we cannot say that the chancellor was in error in so holding.

Several of the items for which the administrator was allowed credit consisted of payments made of indebted-

ness due by the firm of Blumenberg & Jones. These credits were properly allowed, if the deceased was in fact a member of this firm, and if its assets, upon his death, were turned over to his administrator and the payments made out of the proceeds thereof, as is stated in the brief of counsel for the administrator. We have not attempted to verify these facts, for the reason that the decree of the court below must be reversed on other grounds.

We find no error in the allowance of the item of one thousand nine hundred and thirty-one dollars and seventy-four cents paid by the administratrix on the judgment in favor of the Delta Bank against J. L. Haley and the former administrator.

Several of the accounts probated were in favor of partnerships, and it does not appear, from the affidavit thereto, that the person making it (the affidavit) was a member of the firm. This is immaterial, provided such person in fact was a member of the firm.

Section 2106 of the Code requires the clerk, in event he shall approve a claim sought to be probated against the estate of a decedent, to indorse upon it the following words:

"Probated and allowed for $——, and registered this —— day of ——, A. D. ——."

The certificate of the clerk to the claims probated against this estate was not in the statutory language, but was as follows:

"State of Mississippi, Leflore County, Chancery Court.

"I have this day examined the annexed account, and hereby allow the same, for the sum of thirteen & 95/100 dollars, with interest from maturity. Given under my hand and seal of said court this 19th day of September, 1905. "C. W. CROCKETT, Clerk."

The word "probate," in this connection, simply means that the account has, in the judgment of the clerk, been proven in the manner required by law, and the fact that

he allowed and registered it evidences the fact that he decided that it had been so proven, so that his omission to so certify is immaterial. We do not mean to depart from the strict construction heretofore given this statute, but to hold the certificate here complained of invalid would be to sacrifice substance to form, in a case wherein it is manifest that the statute had in all respects been complied with by the persons presenting the claims to be probated, and that the clerk, before allowing them, had so determined.

No error was committed in allowing the administrator credit for the taxes paid on lands owned by decedent at the time of his death, called in question by exceptions numbered 8, 9, and 10. The administrator had the right to pay these taxes in order to protect himself and the creditors of the decedent in their right to subject the land to the payment of the decedent's debts; and in addition the payment of these taxes inured equally to the benefit of all of the heirs of decedent, and therefore none of them are in position to complain.

No error was committed in overruling the exceptions based upon the disposition made by the administrator of the Jerry Miller note.

Reversed and remanded; costs here to be equally divided.

Reversed and remanded.

HASS v. STATE.

[65 South. 502.]

LICENSES. *Occupations. Advertising patent medicines. Laws* 1912, *chapter* 99, *section* 2.

Under laws 1912, chapter 99, section 2, imposing a privilege tax upon "each person, firm or corporation selling or advertising by harangue, in any town or city patent medicines, except a licensed merchant or druggist selling from his place of business," where a party sold a patent medicine to a drug company who had a regular place of business, and agreed as a part of the consideration of the purchase, to assist in advertising it, and accordingly addressed from a platform in front of the company's store, crowds which were attracted by a negro playing and singing, advertising the merits of the medicines, and inviting the crowds to go into the store, where sales were made by employees of the store, such acts did not violate the statute.

APPEAL from the circuit court of Quitman county.

HON. W. D. CUTRER, Special Judge.

F. D. Hass was convicted of advertising patent medicines without the payment of a privilege tax, and appeals.

The facts are fully stated in the opinion of the court.

W. F. Gee, for appellant.

Outside of all other contentions, appellant here contends that the records show that while he was advertising medicine as charged in the affidavit, he was doing so for the Marks Drug Company, and that the said Marks Drug Company had the necessary license to do business; that first he made a trip to Marks, from Memphis, Tennessee, and sold to the proprietor of the Marks Drug Company the goods he was advertising. It is true that the Drug Company paid the appellant more for the first shipment than it would have had to pay for later ship-

ments, but this was in consideration of the advertising to be done by appellant, and we see no material difference between being paid in that way, for work done, and being paid a salary, and it cannot be successfully contended that an employee of a store must have a privilege license to work for a store that has one. It may be contended, by the state, that in this case the appellant was being paid only a commission, if so, we would reply that it is a custom of merchants to gauge their clerks' salary by the amount they sell. The man that controls much trade of course receiving more than the one who controls a small trade, and there cannot be a wide difference between the salary and a commission in this case, and if the record shows that he was working for the Marks Drug Company then he cannot be taxed. See: *Hendon* v. *The State,* 61 Miss. 146.

Laws of the kind under consideration must be strictly construed in favor of the defendant. See: *Bell* v. *Kerr,* 31 So. 708; *Wilby* v. *State,* 47 So. 465; also, see this case in reference to other contentions of appellants; *Bluff City R. R. Co.* v. *Clarke, Sheriff,* 49 So. 177; *City of Newport* v. *Fitzer,* 21 L. R. A. (N. S.) 279; *Ex parte Taylor,* 58 Miss. 478, see, also, in reference to interstate commerce, contention of appellant.

Appellant further contends that the instruction for the state does not fully state the law in this, as the question of whether or not he was working for the Marks Drug Company had been raised, there should have been added, and if you believe further, beyond a reasonable doubt that he was not working for the Marks Drug Company, as the instruction is drawn, it was a peremptory instruction to find him guilty whether he was in the employment of the Marks Drug Company or not.

Appellant respectfully submits that the demurrer to the affidavit should have been sustained, also that the peremptory instruction asked by the defendant should have been granted. He therefore asks that the case be reversed and that he be discharged.

Frank Johnston, for the appellee.

The last objection of the learned counsel for the appellant that the appellant was engaged in interstate commerce in selling to the Marks Drug Store and that he was working for Marks Drug Store in advertising these remedies, after which they would sell to the crowd, has no force or merit whatever. The charge in the indictment is in the very language of the law which places a tax upon either selling or advertising, by harangue, in any town, patent medicines. If he was the advertising agent, and haranguing his wares in this kind of style, he was subject to this privilege tax. I do not think that the suggestion that this was interstate commerce has had any force whatever.

I respectfully submit that the judgment of the lower court should be affirmed.

SMITH, J., delivered the opinion of the court.

Appellant was convicted for an alleged violation of section 2 of chapter 99 of the Laws of 1912, by which a tax of one hundred and fifty dollars is imposed on "each person, firm or corporation selling or advertising by harangue, in any town or city, patent medicines, except a licensed merchant or druggist selling from his place of business."

Appellant sold a lot of patent medicine to the Marks Drug Company, either a corporation or a partnership, engaged in the sale of drugs in the town of Marks, Mississippi, having a regular place of business, and agreed, as a part of the consideration for the purchase thereof, that he would assist the company in advertising and introducing it. This he did in the following manner: A platform was erected in front of the company's store on which appellant would stand, accompanied by a negro with a banjo. This negro would attract a crowd by playing his banjo, singing, and telling stories, and appellant would then make a speech telling the crowd of the great

benefits to be derived by them from the use of this medicine, which they could purchase from the Marks Drug Company. He would then invite the crowd to follow him into the store. After the crowd would congregate in the store, sales of the medicine would be made to the members thereof by employees of the drug company. It will be observed from this statement that appellant, in advertising this medicine, was acting for the Marks Drug Company, which company had the right to have its medicine so advertised if it desired so to do.

No crime was committed, therefore, by appellant, and the instruction requested by him so charging the jury should have been granted.

The judgment of the court below is reversed, and appellant discharged.

Reversed.

MISSISSIPPI R. COMMISSION *v.* WESTERN UNION TEL. CO.

[65 South. 505.]

1. TAXATION. *Levy and assessment. Authority to make assessment. Railroad commission. Assessment. Validity.*

The power to assess property for taxation and to levy and collect taxes is conferred, not by the common law, but by statute, and when so conferred can be exercised only in the manner pointed out by the statute and by the person or persons upon whom the power is therein conferred.

2. TAXATION. *Railroad commission. Back assessment. Validity.*

Under Code 1906, section 4741, the power is conferred upon the railroad commission to assess property which has escaped taxation for previous years only, when notified so to do by the revenue agent; and hence an assessment made at the request of the attorney-general is void.

APPEAL from the circuit court of Hinds county.
HON. W. A. HENRY, Judge.

Proceedings before the Mississippi Railroad Commission for the back assessment of property of the Western Union Telegraph Company. From a judgment of the circuit court, holding void an order of the commission assessing back taxes against such property, the commission appeals.

On February 19, 1913, the attorney-general of Mississippi addressed a communication to the Mississippi Railroad Commission, notifying said commission that the Western Union Telegraph Company had not paid taxes on a line of poles between Meridian, Mississippi, and the state line on the right of way of the New Orleans & North Eastern Railroad Company, a distance of about one hundred and sixty miles, and that said taxes were due from the year 1890 to 1912, inclusive, and should be assessed so that proper suits might be brought to recover same, and requesting that notice should be given to said telegraph company to appear and show cause why it should not be assessed for back taxes. On March 3, 1913, the State Revenue Agent served notice on the telegraph company that its said line of telegraph poles had escaped taxation in former years, and that he had back assessed same from the year 1890 to 1912, inclusive, and citing said telegraph company to appear at the next meeting of the Railroad Commission and make objections, if desired. On the same date the State Revenue Agent notified the Railroad Commission that under the provisions of section 4741 of the Code of 1906, he had assessed said telegraph company with back taxes on said line of telegraph poles at the valuation of one hundred dollars per mile, subject to their consideration and determination at the next meeting of the commission. The Revenue Agent also advised the commission that he was aware that the attorney-general's office had already filed a notice of this delinquency, and protested that the power to levy assessments for back taxes is not conferred upon the attorney-general, but is the province of the

State Revenue Agent. The Railroad Commission, acting in response to the notice of the attorney-general, cited the telegraph company to show cause why it should not be assessed for back taxes on its line of telegraph poles. Afterwards the State Revenue Agent addressed a communication to the commission, in which he stated that it had come to his knowledge that the line of poles in question was not the property of the telegraph company, but was, in fact, owned by the railroad company, and requesting the commission to cite the railroad company to appear and show cause why it should not be assessed on said line of poles, and the railroad company was cited to appear. After hearing the testimony of the officials of both companies which showed the joint arrangement existing for the operation of the telegraph line, the Railroad Commission entered an order fixing the value of the line of poles at one hundred dollars per mile, and assessed the Western Union Telegraph Company with seventy-five per cent. of the value, and the New Orleans & North Eastern Railroad Company with twenty-five per cent. of the value, and directed the attorney-general to bring suit against said companies for taxes for each of the years it had escaped taxation. Both the telegraph company and the railroad company protested against this assessment, and the telegraph company afterwards sued out a writ of *certiorari,* returnable to the circuit court of Hinds county, and upon a hearing the court held that the order of the Railroad Commission was void, and from that judgment the appeal is taken.

Geo. H. Ethridge, for appellant.

It is immaterial for the purpose of this suit whether the Revenue Agent's demand was necessary as a condition precedent to make this assessment because he had requested the commission to make the assessment and requested it to make it for each year named, and the commission has made the assessment. If the contention then

was correct that the Revenue Agent must make the demand, that has been done in this case, and for the purpose of this hearing it is immaterial whether the attorney-general had a right to make the demand or not. All conditions have been met and the commission has acted and has made the assessment, and the request both of the attorney-general and of the Revenue Agent is in the record before the court.

So far as the appellee is concerned, it has been lawfully proceeded against, and if its property is subject to taxation, no complaint can be made as to which request the commission acted upon. It is likewise immaterial whether the property ought to be assessed as real estate or as personal property.

The observation of the supreme court in the case of *Tunica County* v. *Tate,* 78 Miss. 299, is pertinent here, "The law is after taxing the thing and it is not to be defeated by it is being put on one roll instead of another. Rolls are mere matters of convenience, but if this were not true, there is no indication of what roll it should be on and if it be valid it must be presumed that it will be put where it ought to be." This was a case in which an additional assessment of a cotton seed oil mill, giving description of the land on which it was located, was made by the collector and was placed on the personal roll. Dealing with the question in this case, or power of a board or a collector of taxes to make an assessment, the court, in the last paragraph of the opinion said: "It is too late to dispute the constitutionality of the act of the board or the collector. Such emergency statutes have existed for more than fifty years. Two Constitutions have been made during their existence without rebuking them and the courts have annulled them. It is only necessary to read the very able opinion of Judge COOPER in *State* v. *Tonella,* 70 Miss. 711 and 712, to be satisfied on this question. See, also, *Cato* v. *Gordan,* 63 Miss. 322."

It has been held already by the supreme court in more than one case that the right of the Revenue Agent is not

exclusive. See *Adams* v. *Clarksdale,* 48 So. 242, and *Adams* v. *Delta, etc., Company,* 48 So. 190.

The argument of the appellee that there would be confusion if different officers were allowed to pursue an action, each having jurisdiction to prosecute it and pursue the debt by suit, is utterly without weight in view of the many decisions and statutes on this and similar subjects. The very object of creating the office of State Revenue Agent was to confer upon an additional officer, rights to bring suits and other proceedings looking to the collection of the state's revenues. As stated by the supreme court in at least two cases, the state had complete and ample machinery for the collection of taxes and for the assessment of taxes without creating this office. The language quoted from *Thibodeaux* v. *State,* 69 Miss. 92 and 97, was said in reference to the creation of the office of a Revenue Agent and the court at that time seemed to be hostile to this office, fearing that great confusion would arise, but notwithstanding the criticism of the court and its refusal to recognize all the powers conferred upon the Revenue Agent, the legislature has persistently refused to repeal the office and has, from time to time, enlarged the powers and duties of the Revenue Agent. It is manifest that the legislature was going upon the theory that it was necessary to have several officers vested with the power of collecting the state's revenues, believing that the labors of each one will supplement the labors of the others and that several thoughtful minds and several watchful eyes would result in bringing the state just revenues which the tax dodgers had withheld from it.

Harris & Potter and *Mayes & Mayes,* for appellee.

It is contended by the appellee, the Western Union Telegraph Company, that the order of the Railroad Commission was void: First, because the Railroad Commission had no jurisdiction, that it could not institute pro-

ceedings of this character; that is to say, for back assessment of property for taxation of its own initiative or at the instance of the attorney-general, but that it only derived its authority to act at the instance of the State Revenue Agent. See: Code of 1906, sections 4382, 4392; *Adams* v. *Railroad Co.*, 73 Miss. 660; Code of 1892, chapter 126; Code of 1906, chapter 131; *Railroad Co.* v. *Adams,* 77 Miss. 766; *Railroad Co.* v. *Adams,* 85 Miss. ——; *Adams* v. *Bank,* 60 Miss. 770; 37 Cyc. pages 668 and 724; Cooley's Constitutional Limitations (7 Ed.), sections 744 and 746.

Second, that the Mississippi Railroad Company was in no sense a tax collector, but merely vested with authority to assess a certain class of property for taxation and that it could not, of itself, institute proceedings for the collection of taxes when directed by the attorney-general or any other officer than the one legally constituted to collect the taxes; that the whole scheme is statutory and should be strictly complied with. See: *Thibodeaux* v. *State,* 69 Miss. 92, 77; Section 4741, Code of 1906; *Adams* v. *Bank,* 60 So. 770.

Third, that the Railroad Commission had no power to create subjects of taxation, and, therefore, had no right to assess the Telegraph Company with any part of the value of the poles on account of any beneficial use which the Telegraph Company made of the telegraph poles, it not being the owner, but a lessee. See: *Vicksburg Bank* v. *Worrell,* 67 Miss. 47; *Hancock County* v. *Imperial Naval Stores,* 93 Miss. 822; 37 Cyc. 1002; 37 Cyc. 190; *Redmond* v. *Bank,* 60 Miss. 293; *Green* v. *Craft,* 28 Miss. 70; *Booker* v. *Doe,* 24 Miss. 431; *Dunn* v. *Winston,* 31 Miss. 135; *Railroad Co.* v. *Adams,* 76 Miss. 545; 153 N. Y. 98; 134 Mo. 231; Code of 1906, section 4256.

Fourth, that the order was utterly void as to the Western Union Telegraph Company, because under the undisputed facts before the Railroad Commission, it was not the owner of the property sought to be assessed against it.

Fifth, that *certiorari* is the proper remedy in a case of this character. See: *Adams* v. *Railroad Co.*, 77 Miss. 77; *Railroad Co.* v. *Adams*, 85 Miss. 795; Cooley's "Constitutional Limitations," sections 1405 and 1407.

Mayes & Mayes, for appellee.

We contend that the assessment is void because not made at the instance of any person authorized by law to have this property back assessed; the order is further void because the full power of the commission is exercised when they make the assessment, but that the commission can go no further and can empower no one else to go any further, as they are in no sense tax collectors, but simply tax assessors; the order is further void because the commission has no authority to back assess property; the statute speaks prospectively and gives them power on their initiative to make only current assessments, and they can back assess only when requested to do so by some officer having the power to make the request, and in this instance it is the Revenue Agent. Sections 4740 and 4741, Code of 1906.

The right to impose any tax is statutory—the full power rests with the legislature and is subject to any restriction or limitation which the legislature may impose. The power to collect taxes may be given to any officer which the legislature may designate, and no officer can exercise any such power until he is given the power by an act of the legislature. In other words, taxation is the highest exercise of sovereignty, and when property is sought to be taken by taxation, the authority must be found in the law so to do. When an officer attempts to exercise this power he must be able to place his hands on the statute which gives him this power. If he cannot, any act of his is a nullity. These principles are so well settled that we no not think it necessary to cite authority upon this subject. The right to back assess property is statutory right, and if there is no statute authorizing it, it cannot be done. In 27 Eng. Law (2d Ed.), page

698, it is said: To the same effect is the text in volume 37, page 771, Cyc. of Law; and 1 Cooley, on "Taxation," page 607, *et seq.*

The right to back tax assess is a statutory right; it cannot exist without statutory authority, and can be exercised only by the officers given that authority. There can be no dispute about this being the law. We ask the attorney-general to point the statute to us which gives him the authority to collect back taxes. We can readily point him to the authority under which we act, sections 4740 and 4741 of the Code of 1906, which expressly confers this power upon the Revenue Agent. In the case of *State* v. *Tonella,* 70 Miss. ——, the court not only declares that this right must be given by statute, but it tells when, for the first time, such power was authorized in this state.

This is the first attempt upon the part of the attorney-general to exercise the power of Revenue Agent. If it has been the intent of the law to give him such authority there would have been no Revenue Agent's office created. The Revenue Agent is required to maintain his own office, at his own expense; provide himself with the help necessary; and obtain his income from what he recovers. It is not the policy of the law that there should be any conflict between the attorney-general and the Revenue Agent in the discharge of those duties which the law has confided to the Revenue Agent.

In *State* v. *Thibodeaux,* 69 Miss. 97, the court on this subject says: "We are not to suppose that the law may receive such construction as will devolve the same important public functions at the same time upon two distinct officers. The regular and orderly collection of the state's revenues is not to be interrupted and imperiled by the struggles between rival officers and by the legal contests which would inevitably arise between the contending officials. Any other view would involve the collection of the revenue in endless confusion."

Coming now to the powers of the Railroad Commission, let us see what they are. By section 4384, Code of 1906, the commissioners are made State Railroad Assessors. This is the full extent of their power on this subject. They are not made collectors of taxes, and they are not given the power to back assess independently of the action of the Revenue Agent. We have shown that the right to back assess must be given by statute. Let us keep in mind the further fact that the Railroad Commission must find its power for all its actions, expressly given by some statute. See: *Railroad Co.* v. *Adams,* 85 Miss. ——. Were it not for sections 4740 and 4741, Code of 1906, there would be no authority under the statutes for any back assessment upon railroad property. Other sections of the Code give this power to other officers on other kinds of property, but not on railroad property. It is true that in 48 So. 242, the court held that the Revenue Agent was not solely vested with the power to back assess property which had escaped taxation. In that case, however, the court was speaking of the right of the clerk of a municipality to back assess, which power was expressly given by the statute. The power of the Municipal clerk is concurrent with that of the Revenue Agent. The same thing is true of assessors for the counties; but in each instance where the Revenue Agent has not the exclusive right to back assess, the power for some other concurrent authority to do so is expressly found in the statute, and in no instance is it in the attorney-general. While the court held in *Adams* v. *Clarksdale,* that the Revenue Agent did not have the exclusive power to back assess, it did not say that back assessments could be made by any officer of the state, when the statute did not expressly confide the right to do so.

It may not be out of place to call the attention of the court to the fact that the legislature of the state of Mississippi believed this to be the law, because at its session

just adjourned and in House Bill No. 408, authority was given the Railroad Commission to back assess railroad property. The Governor has never approved the bill, though it passed both houses. We cite this as a legislative construction that our contention is correct.

In the case of *Railroad Company* v. *Adams,* 73 Miss. 648, it is expressly held that the power conferred upon the State Railroad Commission to assess property relates to the future; that if it undertakes to back assess property it must be on initiative by the State Revenue Agent. This was declared to be the law as far back as 1895, and that statute under which this decision was rendered is practically the same as now.

We do not take issue with the attorney-general in reference to section 4255 of the Code. This is true only when there has been an assessment of property for that year. If there has been no assessment, there is no lien and cannot be. As the court has expressly held in the case of *North* v. *Culpepper,* 53 So. 419, and *Mullins* v. *Shaw,* 77 Miss. 900, that the foundation of the validity of a tax is the assessment. A mere levy without assessment imposes no charge, fixes no lien, imposes no obligation, in truth, is nothing until followed by an assessment. If there was no authority for assessment of any particular property for that year, and no statute authorizing back assessment, there could be no assessment of the property after the current year had passed.

We failed to appreciate the suggestion of the attorney-general, made on page 7 of his brief, that section 4255 of the Code of 1906, constitutes a new method of collecting taxes, and that the state did not have to proceed according to the formula mapped out under other provisions of the law. The case cited by him of the *Delta & Pine Land Co.* v. *Adams,* 48 So. 190, and 80 Miss. 219, do not bear out this contention. In the *Delta & Pine Land Co.* 48 So. ——, the court merely held that after a Revenue Agent had succeeded in obtaining an assessment he

might sue in either chancery or circuit court. In *Clark* v. *Rev. Agent,* 80 Miss. 219, the decision is about to the same effect.

In the case of *Adams* v. *First National Bank,* 60 So. 770, where the board of supervisors undertake to back assess on its own initiative, independent of the Revenue Agent, the court held they could not do so.

SMITH, J., delivered the opinion of the court.

It is not necessary for us to determine what the common law powers of the attorney-general are, for the reason that the power to assess property for taxation and to levy and collect taxes is conferred, not by the common law, but by statute, and when so conferred can be exercised only in the manner pointed out by the statute and by the person or persons upon whom the power is therein conferred. The only power to assess for taxation, property of the character here involved, is that conferred upon the Railroad Commission by sections 4382 to 4393, inclusive, and by section 4741 of the Code. The first-named sections relate only to assessments for the year in which the assessments are made, and confer no power to assess property which has escaped taxation during previous years. By section 4741 the power to back assess property is conferred upon the Commission, but only when notified so to do by the Revenue Agent. Sections 4277 and 4278, to which we have been referred, deal only with assessments made by county assessors.

Since the commission is given power to assess property which has escaped taxation for previous years only when notified so to do by the Revenue Agent, it follows that the assessment here made at the request of the attorney-general is void. But it is said that this assessment is valid even though the attorney-general was without power to direct the commission to make it, for the reason that the commission was also directed so to do by the Revenue Agent. It is true that the Revenue Agent did

notify the commission that this property had escaped taxation, but it is clear from the record that this notice was disregarded by the commission, and the assessment made in accordance with the request of the attorney-general; the order by which it was made going to the extent of directing him to proceed to collect the taxes due on the property by suit.

Of course any authority the attorney-general may have, under section 4256 of the Code, to institute a suit for the recovery of taxes due the state is not here involved.

Affirmed.

NEW ORLEANS & N. E. R. Co. v. NEW ORLEANS GREAT NORTHERN R. Co.

[65 South. 508.]

1. ACCOUNT. *Equity. Jurisdiction. Adequacy of legal remedy. Pleading. Multifariousness. Code* 1906, *section* 598.
   Where complainant railway company, while operating its trains over defendant's railway tracks under a joint agreement, sustained a wreck and a collision due to the negligence of the servants of defendant, thereby suffering great damages and being compelled to pay large sums of money to divers persons, and its rights may depend upon the statement of a mutual account involving many items. In such case complainant not having a full, adequate and complete remedy at law for damages may maintain a suit in equity for the statement of a mutual account.

2. EQUITY. *Pleading. Demurrer. General demurrer.*
   A general demurrer must be sustained or overruled in its entirety.

3. EQUITY. *Pleading. Multifariousness. Code* 1906, *section* 598.
   Under Code 1906, section 598, so providing, the uniting in the same bill of several distinct and unconnected matters of equity against the same defendant does not render the bill multifarious.

APPEAL from the chancery court of Pearl River county.
HON. R. E. SHEEHY, Chancellor.

Bill by the New Orleans Great Northern Railroad Company against the New Orleans Railroad Company. From a judgment overruling its demurrer to the bill, defendant appeals.

Appellee was complainant in the court below, and appellant was defendant. Appellant is referred to as the Northeastern Railroad, and appellee as the Great Northern. This suit was begun by a bill in chancery filed by the Great Northern Railroad Company, alleging that it operated a line of railway in the states of Mississippi and Louisiana, and that by virtue of an agreement entered into between the two companies the Great Northern Company operated its trains over a part of the track of the Northeastern Company between Slidell, Louisiana, and New Orleans, Louisiana, a distance of about thirty miles. Complainant alleges that, while operating its train upon the defendant's tracks under said agreement, a train of complainant was derailed at Sea Brook, Louisiana, because of the alleged negligence on the part of the defendant in not properly maintaining its tracks, and that at another time a train of complainant collided with the end of a train of defendant at Little Woods, Louisiana, said collision being due to the alleged negligence of defendant, and that by both of these accidents the complainants suffered great damage and had to pay large sums of money to divers persons who were injured, and suffered largely by destruction of its property.

The prayer of the bill is for an injunction to restrain the defendant from instituting any suit or suits against complainant touching the subject-matter of this suit, and for the appointment of a master to state an account of all items of expenditure by both complainant and defendant growing out of the two accidents, and for a decree against the defendant for the amount of liability found by said master to complainant for all sums

of money paid out on claims and expenses for injury to its property. The bill also prays that paragraphs 9 and 10 of the contract between the two companies be declared invalid, and that the rules of law applicable to causes of action involved and growing out of said contract be applied to the recovery and enforcement of the cause of action between complainant and defendant, and that, if said paragraph 9 of said agreement is to be given effect, then it is alleged that the defendant's negligence is the proximate cause of both of said accidents, and by reason of such negligence it has become liable to the complainant, and the bill prays that said company be adjudged to be solely responsible for both of such accidents.

Said agreement contains the following provisions, to wit:

Ninth. The responsibility of the parties hereto, as between themselves, for the defense or payment of all claims, demands, suits, judgments, and sums of money, to any person accruing for loss or injury, either to person or estate, arising out of the operation of the tracks and facilities to be jointly used hereunder, shall be distributed as follows, that is to say: . . . (d) When the proximate cause of any such damage shall be negligence in the maintenance of any portion of the tracks or property jointly used, then each party hereto shall be solely responsible for and shall bear all loss incident to or resulting from the wreck, derailment, or other accident to its own trains, in all respects as if such accident had occurred on a portion of its own line used solely by it. When under the terms of this agreement, it shall be the duty of any superintendent, trainmaster, train dispatcher, or telegraph operator of the Northeastern Company to move any train of the Great Northern Company, he shall be considered the employee of the Great Northern Company in the performance of, or omission to perform, such duty, within the purview of the provisions hereinbefore set forth.

The tenth paragraph, referred to, provides that if, at any time, a difference of opinion shall arise between parties in respect to the provisions of the agreement, or as to their rights or liabilties under it, the same shall be referred to "amicable compounders," etc.

There was a general demurrer filed by the defendant, which the court overruled, and this appeal is taken.

J. Blanc Monroe and *R. H. & J. H. Thompson,* for appellant.

Marlin E. Olmstead and *Green & Green,* for appellee.

SMITH, J., delivered the opinion of the court.

Conceding that appellee has only one cause of action on account of the damages alleged to have been sustained by it by reason of the Little Woods wreck, and only one by reason of the damages alleged to have been sustained by it by reason of the Sea Brook derailment, and that it has a remedy at law for the collection thereof, such remedy is far from being plain, adequate, and complete. Its right may depend upon the stating of a mutual account, and in any event, if it is entitled to recover at all, the amount thereof will depend upon the correctness of the many items composing its account, the proof of which will be attended by such difficulties and complications as to render it well-nigh impossible for a jury to bear in mind the evidence relative thereto when considering what verdict it will render. This account can be stated accurately only by the methods employed in a court of chancery.

Appellant contends, however, that the bill discloses no liability on its part, and therefore no occasion for an accounting arises. There is no merit in this contention, for independently of the contested provisions of the contract sued on, and which we will leave altogether out of view, appellee will be entitled to recover the damages sustained by it on account of the Little Woods wreck in

the event the evidence discloses that this wreck was occasioned by what is alleged to have occurred at South Point, for the negligence there complained of is not the negligence of any of the character of employees mentioned in paragraph "d" of the ninth subdivision of the contract. This being true, it is not necessary for us to determine whether the bill states a cause of action with reference to the Sea Brook derailment, and we will therefore leave the allegations of the bill relative thereto entirely out of view in this connection, for the demurrer is a general one, and must be sustained or overruled in its entirety.

It is true that the causes of action for the damages alleged to have been sustained by appellee by reason of the Little Woods wreck and Sea Brook derailment are separate, but both of them present matters of equitable cognizance, in that it is necessary for the two accounts relative thereto to be stated in accordance with the methods pursued in a court of equity, and therefore the bill is not multifarious under the provisions of section 598 of the Code.

Affirmed and remanded, with leave to appellant to answer the bill within thirty days after the filing of the mandate in the court below.

Affirmed and remanded.

ON MOTION TO CORRECT OPINION.

The decree of the court below was affirmed on a former day of this term, and we have now been requested by counsel on both sides for a modification of the language in which a portion of the opinion rendered was couched. That language is as follows:

Appellant contends, however, that the bill discloses no liability on its part, and therefore no occasion for an accounting arises. There is no merit in this contention, for independently of the contested provisions of the con-

tract sued on, and which we leave altogether out of view, appellee will be entitled to recover damages sustained by it on account of the Little Woods wreck in the event the evidence discloses that this wreck was occasioned by what is alleged to have occurred at South Point, for the negligence there complained of is not the negligence of any of the character of employees mentioned in paragraph "d" of the ninth subdivision of the contract.

We do not think this language could be held to imply what counsel are afraid it does, but, in order that there may be no doubt on that score, we will say that it should be read as if written:

Appellant contends, however, that the bill discloses no liability on its part, and therefore no occasion for an accounting arises. There is no merit in this contention, for independently of the contested provisions of the contract sued on, upon which we express no opinion, appellee will be entitled to recover damages sustained by it on account of the Little Woods wreck in the event the evidence discloses that what is alleged to have occurred at South Point was the proximate cause of this wreck for the negligence there complained of is not the negligence of any of the character of employees mentioned in paragraph "d" of the ninth subdivision of the contract.

Of course, we do not mean to imply that the court below is precluded from considering any other elements of negligence averred in the bill proximately causing the injury complained of at Little Woods. We have simply left these other elements out of view, and expressed no opinion relative thereto, for the reason that it was unnecessary to do so on this appeal. Neither have we meant to imply that appellant is cut off from any defense it may have with reference to the Little Woods wreck not disclosed by the bill of complaint and which may hereafter be made to appear in a proper manner.

CHESTER v. STATE.

[65 South. 510.]

CRIMINAL LAW. *Evidence. Confession. Plea of nolo contendere.*

A plea of *nolo contendere* is only a limited confession of the charge and does not amount to a general confession of guilt and is not binding on the defendant in another prosecution even for the same offense, and cannot be introduced against him.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Charm Chester was convicted of keeping intoxicating liquors for sale, and appeals.

The facts are fully stated in the opinion of the court.

W. J. Croon, for appellant.

Frank Johnston, for appellee.

REED, J., delivered the opinion of the court.

Appellant was convicted on the charge of unlawfully keeping for sale intoxicating liquors. Evidence was admitted, over objection of appellant, showing that she was arraigned in the city court of Jackson on an affidavit charging her with keeping liquor for sale in violation of the laws of the city, based on the same facts testified to in this case, and that her plea was then *nolo contender.* The plea was entered in the city court by appellant's attorney, and it does not appear that she was present at the time. The fine imposed by the city court for the offense was paid.

The following instruction was given for the state:

"The court instructs the jury for the state that, if you believe from the evidence in this case beyond a reasonable doubt that the defendant, or her attorney for

her with her consent, entered a plea of *nolo contendere* in the city court of Jackson to an affidavit charging her with keeping liquor for sale based on the same facts as testified to in this case, then such plea is an implied confession on the part of the defendant of her guilt on such charge in the court where entered."

We take the following definition of the plea of *nolo contendere* from Black's Law Dictionary:

"The name of a plea in a criminal action, having the same legal effect as a plea of guilty, so far as regards all proceedings on the indictment, and on which the defendant may be sentenced. *U. S.* v. *Hartwell,* 3 Cliff. 221, Fed. Cas. No. 15,318. Like a demurrer this plea admits, for the purposes of the case, all the facts which are well pleaded, but is not to be used as an admission elsewhere. *Com.* v. *Tilton,* 8 Metc. (Mass.) 232. Not available as an estoppel to a civil action. *Com.* v. *Horton,* 9 Pick. (Mass.) 206."

This plea is now of infrequent use in this state. It appears that it is in general practice in some of the New England states.

In the case of *Buck* v. *Commonwealth,* 107 Pa. 486, it is said that:

"The plea of *nolo contendere* is a mild form of pleading guilty."

Mr. Bishop in his New Criminal Procedure, vol. 1, section 802, defines the plea as:

"The defendant's declaration in court that he will not contend with the prosecuting power."

Discussing when the plea may be used and its effect, Mr. Bishop says in the same section:

"It is pleadable only by leave of court, and in light misdemeanors. The difference between it and guilty appears simply to be that, while the latter is confession binding the defendant in other proceedings, the former has no effect beyond the particular case. It simply justifies the court in imposing its sentence."

In the case of *State* v. *La Rose,* 71 N. H. 435, 52 Atl. 943, it was decided that:

"Upon the trial of an indictment for the illegal keeping for sale of spirituous liquor, the respondent's plea of *nolo contendere* to a complaint charging the same offense, at the same place, on an earlier date, is not admissible in evidence against him."

In the La Rose Case, Judge PARSONS, delivering the opinion of the court and discussing the plea, says:

"Under the plea of *nolo,* the defendant does not confess or acknowledge the charge against him as upon a plea of guilty, but, waiving his right to contest the truth of the charge against him, submits to punishment. The plea is in the nature of a compromise between the state and the defendant—a matter not of right, but a favor. Various reasons may exist why a defendant conscious of innocence may be willing to forego his right to make defense if he can be permitted to do so without acknowledging his guilt. Whether in a particular case he should be permitted to do so is for the court."

The plea is only a limited admission of the charge. The entering of the plea in this case by appellant's attorney did not amount to a general confession by her of her guilt. By the plea she only waived her right to contest the truth of the charge against her and submitted to the punishment. In the particular case, the prosecution against her in the city court, the plea was effective just as if she had pleaded guilty, but it is not binding upon her, nor does it have any effect beyond that particular case. We therefore conclude that the court erred in admitting the evidence of the plea and granting the instruction relative thereto.

Reversed and remanded.

STATE v. JONES.

[65 South. 511.]

CRIMINAL LAW. *Appeal. Decisions reviewable. Academic question.*

The supreme court will not consider or decide purely academic or abstract questions of law in cases appealed by the state after acquittal.

APPEAL from the circuit court of Forrest county.

HON. P. B. JOHNSON, Judge.

W. F. Jones and others were acquitted of crime and the state appeals.

The facts are sufficiently stated in the opinion of the court.

COOK, J., delivered the opinion of the court.

The attorney-general in his brief says:

"The case is ended finally and conclusively by the verdict of not guilty. Nothing more can be done, no matter what this honorable court may do upon this appeal. This question is purely academic. This court has, on several occasions, declined to consider or decide purely academic or abstract questions of law in cases appealed by the state."

Without considering the point raised by the appeal, the judgment is affirmed.

Affirmed.

SIMMONS v. STATE.

[65 South. 511—64 South. 721.]

1. CRIMINAL LAW. *Instructions. Cure by other instruction. Oral instructions.*

The giving of an erroneous instruction for the state in a trial for rape "that the crime of rape may be proven by circumstances, and it is not necessary to have eyewitnesses to the deed, if circumstances are sufficient to convince the jury beyond a reasonable doubt, that the accused party is guilty;" is not cured by the giving, at defendant's request, of an instruction, that to convict, the state must prove to the jury's satisfaction beyond a reasonable doubt that the defendant had sexual intercourse with prosecutrix, and that the injury was caused in no other way, and that if it failed to do this, the verdict should be not guilty, since the defendant's instruction did not in any way mention circumstantial evidence.

2. CRIMINAL LAW. *Instructions. Oral instructions.*

It is reversible error for the trial court to orally instruct the jury as to the verdict they were authorized to render.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Judge.

The opinion of this case is on a suggestion of error. The case is reported in 105 Miss. 48.

H. V. Wall, district attorney, for the state.

R. W. Cutrer and *J. M. Alford,* opposed.

COOK, J., delivered the opinion of the court.

At a former day of this term this case (64 So. 721) was reversed and remanded, because of errors in the instruction given by the trial court for the state. The case is again before us upon suggestion of error.

In the former opinion, the instruction condemned reads as follows:

"The court instructs the jury for the state that the crime of rape may be proven by circumstances, and it is not necessary to have an eyewitness to the deed, if the circumstances are sufficient to convince the jury beyond a reasonable doubt that the accused party is guilty."

It is contended by the state that the error in the instruction just quoted is cured by the following instruction given to the jury at the request of the defendant, viz.:

"The court instructs the jury for the defendant that it makes no difference in this case whether Retta Simmons was injured on a wire fence or not, or how she was injured; but before you can convict this defendant of the offense, the state must prove to your satisfaction beyond a reasonable doubt, that the defendant had sexual intercourse with her and the injury was caused in no other way, and, if it has failed to do this, you must find him not guilty."

The state contends that the instruction condemned by the former opinion of this court, read in connection with the instruction just quoted, correctly announces the rule governing the probative value of circumstantial evidence. In other words, the argument is that the two instructions advise the jury that "the state must prove to your satisfaction beyond a reasonable doubt that the defendant had sexual intercourse with her, and that the injury was caused in no other way," means that the jury cannot convict on circumstantial evidence alone, unless the evidence excludes every reasonable hypothesis other than the guilt of defendant.

We are unable to see how the instruction given for the defendant in any way aids the instruction given for the state. The state's instruction erroneously announces the rule governing the probative value of circumstantial evidence, and the instructions given at request of defendant does not mention circumstantial evidence at all. This is the second appeal of this case, and in the first appeal we condemned the instruction now under review.

It is now suggested that the second reversal is based on "flimsy technicalities," which have no place in the jurisprudence of this enlightened age. This condemnation of the ruling of the court is rather robust, but not altogether convincing, inasmuch as no flaws in the reasoning of the court are pointed out by the able and zealous advocate.

It is also suggested that to try and retry the instant case imposes unnecessary expense upon the taxpayers. We venture to suggest that the obvious way to prevent additional and unnecessary expense is to try the case in the manner first pointed out by this court in the *Algheri Case,* 25 Miss. 584, in 1853, which case has been frequently followed and never stigmatized as dealing in "flimsy technicalities" until the filing of this suggestion of error, by the learned district attorney.

It may not be inappropriate to say that the improvident expenditure of public money cannot be justified or excused, but it must be remembered that the humblest member of society is guaranteed a fair trial before an impartial jury properly advised of the rules of law to be applied by them in determining whether or not he shall pay the penalty of the law.

We prefer to believe that a fair trial according to the rules prescribed by the established law of the state is infinitely more important than the saving of a few dollars.

In addition to the error in the written instruction, it seems that the trial judge instructed the jury orally in regard to the verdicts the jury were authorized to render in this case. This was fatal error. *Gilbert* v. *State,* 78 Miss. 300, 29 So. 477.

Suggestion of error overruled.

BRANTLEY v. STATE.

[65 South. 512.]

CRIMINAL LAW. *Intoxicating liquors. Offenses. Defenses.*

Where a defendant at the request of another, to obtain him some whiskey, bought it from one selling in violation of law, he was guilty of acting as the agent of the purchaser and he cannot escape liability, by showing that he had been employed to obtain evidence against another unlawfully, selling intoxicants, and had the assurance of a deputy sheriff before making the purchase, that he would incur no risk; since his offense was entirely unnecessary to obtain evidence against the seller and was entirely distinct from that of unlawful selling.

APPEAL from the circuit court of Chickasaw county.

HON. H. K. MAHON, Judge.

Will Brantley was convicted of acting as agent of the purchaser in the unlawful sale of intoxicants and appeals.

The facts are fully stated in the opinion of the court.

Joe H. Ford, for appellant.

As far as I have been able to discover, after exhausting every resource at my command and making a very exhaustive search, there is no authority of this court directly in point. Only one case has been found where a party who acted for the officers as spy, agent, or detective in ferreting out crime was prosecuted for participation therein. That case is *State* v. *Torphy,* 78 Mo. App. 208, cited and digested in 6 Dec. Dig., Crim. Law, sec. 20, and as an authority to the case of *Com.* v. *Hollister,* in 25 L. R. A. 787, 3 L. R. A. Extra Anno., New Ed., Cases as Authorities, p. 1369. In that case, the defendant, acting as a spy for the purpose of procuring evidence against gamblers, entered into a game with them and took part in the gambling. He was afterwards

indicted for gambling on that occasion and was convicted. On the appeal, the appellate court held that he was not punishable therefor. This view comports with reason and common sense. There was no guilty purpose or intent on the defendant's part in taking part in the game, although had he participated in the game, as he did, with the same purpose and intent of those against whom he was trying to secure evidence to arrest and convict, he would have been equally guilty with them.

So far as I have been able to find, the authorities hold that one occupying the position of this appellant on that occasion is not even guilty as accessory or accomplice. The criminal intent is lacking. He was acting for the benefit of the public. 12 Cyc. 189, 447; Jones on Evidence, sections 768 and 770; *Wright* v. *State,* 7 Tex. Ct. App. 545, 32 Am. Rep. 599; *State* v. *Gibbs,* 109 Minn. 247, 123 N. W. 810, 25 L. R. A. (N. S.) 449; *Com.* v. *Hollister,* 26 Nev. 196, 65 Pac. 802, Am. St. Rep. 688; *Sanchez* v. *State,* 90 S. W. 641, 48 Tex. Cr. Rep. 519; Wigmore on Evidence, section 2060 (b); *State* v. *McKean,* 36 Iowa, 343, 14 Am. Rep. 530.

Frank Johnston, assistant attorney-general, for the state.

The question arising on the objection to testimony is stated far too broadly by the appellant's counsel. The court did not rule out the evidence to the extent and in the manner as stated by the apellant in his brief. On the contrary, Neal, the defendant's own witness, was permitted by the court, to state, and did state, everything that he knew in regard to the alleged authority that he had given to the defendant to act as agent for Sykes in the purchase of the whiskey. The witness stated positively that he had authorized the defendant to act as a spy or detective in buying whiskey from this particular woman, the widow Smith, but that he never on any occasion authorized him to act as a detective in

playing the part of an agent in the purchase of the whiskey, and that the full extent of his authority was to act as a detective in the purchase of the whiskey as a buyer of the whiskey and not as the agent for another. Neal says he never heard of the Sykes matter. I submit to the court that the ruling of the circuit court was correct in not allowing evidence generally of a general authority to the defendant from any official to act as a spy or detective in the liquor business generally.

This ruling is sound, I think, for the reason that he might have had the general authority to detect illicit liquor traffic and might have acted on his own responsibility and for himself in this particular instance. So that when Mr. Neal was specifically examined in regard to this particular occurrence, the court opened the door wide and let him testify fully on the subject. When the defendant found that Neal's testimony had failed him, he shifted the ground and stated that Mahan had authorized him to play the part of an agent for Sykes, but the defendant didn't suggest, in his testimony, anywhere, that he ever reported this matter to Mahan and Mahan therefore, is supposed to know nothing about it. So that the court did not exclude the evidence on this line in regard to the particular instance.

Mr. Arrington, the sheriff of the county, said that Lon Mahan was his deputy and that Mahan, on one occasion, told him that he was working up some liquor cases, but he never mentioned the defendant at all as having any connection whatever with his detective work.

Chenault, the justice of the peace, contradicted the defendant flatly in the statement made by the defendant that he had reported this matter to Chenault of the Sykes matter. He says that the defendant never told him anything about the Sykes matter or this Neal business but it seems that this defendant had been acting as a purchaser of whiskey under Mahan's authority in

a transaction in which this widow was indicted, that she was tried and acquitted, but that nothing whatever was said about the defendant and the Neal employment. The widow Smith was never tried on the indictment in the matter of the sale to the defendant for Jesse Sykes. The whole story seems to have been discredited about the defendant acting as a detective for Neal, the constable, in the Sykes matter. This seems to have been treated as a side speculation of Mr. Brantley's—a little transaction on his own hook in which he got a drink of whiskey out of one of the bottles. So far, therefore, as the question of evidence is concerned and the ruling of the court on the question of evidence, I respectfully submit that there was no error whatever in the ruling of the trial judge.

The first instruction for the state is clearly correct. It tells the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, with three dollars of Jesse Sykes' money, went to the Smith house and purchased the half gallon of whiskey for Sykes, as charged in the indictment, that is, meaning if he purchased the whiskey illegally and with a criminal intent, they should convict the defendant.

The second instruction granted for the state simply distinguishes between the selling of whiskey and acting as an agent for the purchaser of whiskey. It told the jury that although they may believe from the evidence that the defendant was not guilty of selling whiskey, yet if he was guilty of acting for a purchaser in the purchase of whiskey, as charged in the indictment, they should convict him.

The first instruction refused for the defendant was a peremptory charge and ought to have been refused. The second instruction is not pertinent to the facts because it assumes that the defendant was acting for J. R. Neal in this particular transaction for the purchase in ferreting out sales of whiskey, whereas, in point of

fact, there was no evidence that he was acting under the authority of J. R. Neal in acting as agent for Sykes and in purchasing the whiskey for Sykes.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a conviction for acting as agent or assistant of the purchaser in the unlawful purchase of intoxicating liquor. A Mr. Sykes gave to appellant three dollars, and requested him to purchase for him (Sykes) some whisky. This appellant did, purchasing the whisky from a woman named Smith, and delivering it to Sykes. The testimony for appellant was to the effect that he had been requested by a deputy sheriff to assist him in ferreting out "blind tigers," and particularly to assist him in obtaining evidence that Mrs. Smth was engaged in the unlawful sale of liquor; that after this money had been given him by Sykes, and before purchasing the liquor, he reported the fact to the deputy sheriff, who then requested him to make the purchase, so that evidence might be obtained against Mrs. Smith, promising that he (the deputy sheriff) would see that no harm resulted to him for so doing. This evidence was excluded by the court, and the court's action in so doing is assigned for error.

In support of appellant's contention we have been referred to a long line of cases holding that "the pretended confederate who, as detective, spy, or decoy, associates with wrongdoers in order to obtain evidence" is not an accomplice, provided he "has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offense." All of these cases, except *State* v. *Torphy*, 78 Mo. App. 206, are cases wherein it was sought to apply to the evidence of such persons the rules governing that of an accomplice. In *State* v. *Torphy* it was held that such a person was not punishable, although he so far co-operates with his confederates as to be guilty if his intention had been the same as theirs.

Conceding for the sake of the argument that the rule here invoked is sound, the case at bar does not come within it, for the reason that appellant is not being prosecuted for selling liquor, nor for assisting the seller in selling liquor; he is being prosecuted for the substantive crime of acting as agent for the purchaser of liquor. This is a crime distinct from, and not included in, the crime of selling liquor, the commission of which was wholly unnecessary in order for appellant to obtain the evidence which he claims to have been seeking. Stated most favorably for him, what he did amounts simply to this: That, in order to provide Mrs. Smith with an opportunity of violating the law, he himself committed a crime distinct from, and not included in, the one she was thereby induced to commit.

Affirmed.

DODD *v.* KELLY.

[65 South. 561.]

JUDGES. *Disqualification. Constitution* 1890, *section* 165, *Code* 1906, *section* 120.

Under Constitution 1890, section 165, and Code 1906, section 120, so providing, a chancellor is disqualified from presiding in a case where he is connected by affinity or consanguinity with parties to the proceeding, without the consent of all parties, and this is true whether his decision be right or wrong.

APPEAL from the chancery court of Attala county.

HON. J. F. MCCOOL, Chancellor.

Petition by S. L. Dodd and others against C. C. Kelly and others. From an order denying complainant's motion requesting the chancellor to recuse himself from sitting in a trial, petitioner appeals.

The facts are fully stated in the opinion of the court.

Flowers & Brown, for appellants.

The disqualification relied upon is kinship to parties in interest. The chancellor admitted his relationship to parties in interest as charged but seemed to take the view that since he is not related to the corporation, The C. C. Kelly Baking Company, he is not disqualified. The said section of the Constitution was intended to deal with facts and not merely with theories, with substances and not with mere letters, and words. It was intended to forbid judges to sit in cases where their relatives are so situated as to be affected by the result of the litigation or by the manner in which the cause is dealt with.

Our court has had before it, only a few times, any question as to the qualification of a judge. In *Lemon* v. *Peyton,* 64 Miss. 161, it was urged that a member of the board of supervisors, who canvassed for and signed a petition for an election under the local option law, was disqualified to act on the petition when it came before the board. This court affirmed the judgment of the circuit court of Hinds county holding that the members of the board were not disqualified on the ground of interest. It was said that the interest which disqualifies a judge is pecuniary and not political. Page 170. The same kind of question as to interest was before the court in *Ferguson* v. *Brown,* 75 Miss. 214, and the court reached the same conclusion, to wit: That it is a pecuniary or property interest which disqualifies and not a political interest or one which a judge has in common with the community in general.

In *Kerby* v. *State,* 78 Miss. 175, the court held that Hon. Patrick Henry was not disqualified as judge to preside at the trial of Kirby on an indictment drawn while he was district attorney. *Metcalfe* v. *Bank,* 89 Miss. 649, presented only a question of the sufficiency of the pleadings with respect to the disqualifying interest of Chancellor Percy Bell. It was said that the record did not show that he was a party nor how he was interested.

The learned chancellor evidently did not have called to his attention, when the question of his disqualification was suggested, the broad judicial utterance of this court in *Y. & M. V. R. Company* v. *Kirk,* 102 Miss. 41. Here the court declares the spirit and substance of a constitutional provision, when it says that the word "party" does not mean simply a party to the record but included all persons who have an interest in the result. And in that case it was held that the word "party" included attorneys who had a contingent interest in the result of the trial; and that this interest of attorneys who were related to the presiding judge disqualified him, even though the judge did not know of such interest or what it was at the time the case was being tried.

There is no necessity to discuss further this question. The opinion in the Kirk case settles it. Prior to the decision of that case Chief Justice WHITFIELD acted upon the same construction of the constitutional provision when he recused himself in the case of *Hinds* v. *Shumaker,* 97 Miss. 669, 52 So. 705, because his son, A. H. Whitfield, Jr., was one of the attorneys for Shumaker and had a contingent interest in the recovery. And he had done the same thing in *Sively* v. *Sively,* When the word "party" is defined to include all persons pecuniarily interested in the business before the court, our position is established and the chancellor's observation that he is no kin to the corporation is answered.

R. H. & J. H. Thompson, for appellant.

The appellants seek only to have this court decide whether or not Chancellor McCool should have recused himself on the facts made known by this record. The interest of a large part of the public, demands such a decision, and we submit, for the public good, this court should decide the question. We cannot understand why appellees should, if they do, object to a decision of the question. They surely do not wish to have their rights adjusted by a chancellor who is disqualified.

That Chancellor McCool was disqualified and erred in declining to recuse himself seems to us to be clear, when the case is considered in the light of Constitution of 1890, section 165, and the decisions of this court in the cases of *Nimocks* v. *McGehee,* 97 Miss. 321, 52 So. 626, and *Yazoo, etc., R. Co.* v. *Kirk,* 102 Miss. ——, 41 So. 710-834.

The brief of our associate so ably presents this feature of the case as to relieve us from argument touching it.

Noel, Boothe & Pepper and *J. A. Niles,* for appellees.

Appellants sought the hearing before Judge McCool when they filed their bill, sought to have him recused on February 16, and on February 17, sought a final hearing of this matter before him; and now cannot be heard to object to the decision of the court whose action it solicited.

The interest required to oust the court of its jurisdiction is not to be a mere possible contingent interest; not an interest in the question or general subject to which the matter requiring adjudication relates, but one that is visible, demonstrable and capable of precise proof. *Inhabitants of Northhampton* v. *Smith,* 52 Mass. 390; *Trustees of Internal Improvements Co.* v. *Bailey,* 10 Fla. 213. "The interest of a judge must be direct and immediate, not remote or contingent. Any other construction would be harsh, constrained, technical, and would, without any just reason, unnecessarily embarrass the administration of justice." *Peck* v. *Freeholder,* 20 N. J. L. 466; *Ellis* v. *Smith,* 42 Ala. 553.

A judge, who was a member of the chartered state bar association of Alabama, and whose fees to that association were liable to be taken for court costs, if adjudged against the association, can be compelled, by mandamus, to preside at the trial of a proceeding by the bar association, in its corporate name, to disbar an attorney. *Ex Parte State Association,* 12 L. R. A. 135-6.

A judge is not disqualified by reason of having once owned stock in the corporation which was a party to a suit before him, if he had sold the stock, although he might be liable to be sued for *ultra vires* acts done while a director of the corporation. *Nicholson* v. *Showalter,* 83 Tex. 99.

A judge is not disqualified on account of relationship to one who owns an interest in the property which is the subject of suit, but whose interest is not involved in the question then before the court. *In Re Dodge, etc., M. F. G. Co.* (N. Y.), 33 Am. Rep. 579; *Hume* v. *Commercial Bank* (Tenn.), 43 Am. St. Rep. 290. The relationship of the judge to one summoned as garnishee does not disqualify him from hearing the main action. *Patterson* v. *Seeton* (Tex.), 47 S. W. 73, drainage district embracing his own land; 23 Cyc. 579; *In Re Ryers* (N. Y.), 28 Am. Rep. 88.

COOK, J., delivered the opinion of the court.

On the 14th day of February, 1914, the C. C. Kelly Banking Company made a general assignment for the benefit of its creditors, conveying all of its assets to R. E. Kelly and J. S. Niles as assignees. On the same date the assignees filed the following petition:

"To the Hon. Chancery Court of Attala County, Miss.:

"Your petitioners, R. E. Kelly and J. S. Niles, would show unto the court that the board of directors of the C. C. Kelly Banking Company on this day passed a resolution directing C. C. Kelly, the president of said bank, to execute and deliver to your petitioners a general assignment of all the assets of said bank, and that in pursuance of said resolution, same being filed herewith, marked 'Exhibit A' and prayed to be taken as a part of this petition, he executed, as president aforesaid, a general deed of assignment conveying to your petitioners all of the property of said bank, same being filed herewith as 'Exhibit B' and prayed to be taken as a part

of this petition; that in pursuance of said resolution and said deed, your petitioners have taken charge of the assets of said bank, and are now engaged in preparing to present inventories of same to this court, as required by law. Your petitioners are ready and willing and will at once execute a bond as the court may designate as such assignees. The premises considered, your petitioners pray that all persons interested, both creditors and stockholders of said bank, be made parties hereto, and that your petitioners be accepted as receivers and assignees of said bank, and as such authorized and directed to take charge of same, and administer its affairs as hereinafter directed by the orders of this court, said receivers to execute a bond in the penal sum of four hundred and thirteen thousand, twelve dollars and four cents, same to be approved by the clerk of the chancery court. Petitioners pray the court that said receivers be allowed fifteen days in which to prepare and file said inventories. And in duty bound petitioners will ever pray."

On the same date the chancellor made the following order:

"State of Mississippi, County Attala.

R. E. Kelly and J. S. Niles v. C. C. Kelly Banking Company. No. 3137.

"The above cause this day coming on for hearing on petition of R. E. Kelly and J. S. Niles to be appointed as receivers of the C. C. Kelly Banking Company, and it appearing to the court that the said C. C. Kelly Banking Company have this day made a general assignment, to them for the benefit of its creditors without preferences, and it further appearing that they have taken charge of the property of said bank, it is ordered, adjudged, and decreed that they be and are hereby appointed as receivers of said bank, and as such they are directed to execute a bond conditioned according to law,

same to be approved by the chancery clerk in the penal sum of four hundred and thirteen thousand, twelve dollars and four cents, and it further appearing to the court that a short time will be necessary for them to prepare an inventory of the assets of said bank, they are therefore granted fifteen days in which to prepare and file same. Ordered, adjudged, and decreed on this the 14th day of February, 1914."

On the 16th day of February appellants filed a petition, which recited, among other things, the assignment of the bank, and charged that the assignees by reason of their relationship to the president and directors of the bank, and because of their youth, inexperience, and want of capacity were unfitted and disqualified to be receivers. This petition prayed for the appointment of E. Carr as receiver of the bank, and also prayed they, the assignees, Kelley and Niles, be restrained from exercising the functions of receivers and that all previous orders of the court conflicting with this prayer be rescinded.

On the same day the assignees answered the petition of appellants, denying generally the allegations thereof, and praying that the petition be dismissed, and that they be permitted to continue in the administration of the bank's affairs. On the same day the assignees filed another petition and asked the appointment of E. Carr as coreceiver. On the same day the chancellor made an order granting the prayer of the assignees for the appointment of E. Carr as coreceiver. Whereupon appellants filed the following motion:

"Come the complainants in the above-styled cause, by their attorneys, and ask the chancellor, Hon. Jas. F. McCool, to recuse himself from sitting as chancellor in the trial of the issues involved in this cause, for the reason that said chancellor is disqualified under section 165 of the Constitution of the state of Mississippi to preside, because he is connected by affinity and con-

sanguinity to the parties in this suit; that is to say: First, because J. S. Niles, one of the parties appointed by this court to act as receiver in connection with R. E. Kelly, and to take charge of the estate of the C. C. Kelly Banking Company, is connected by marriage in this: That the said J. S. Niles is a nephew by marriage, being a son of his wife's brother, and thus disqualified expressly by said section of the Constitution; second, because J. N. Alexander, one of the defendants in this suit is a brother-in-law to the presiding court, they having married sisters, and said J. N. Alexander is a stockholder and a member of the board of directors of said defunct bank, and the uncle of said J. S. Niles; third, because J. Niles Boyd, one of the defendants, is a stockholder in said defunct bank, was a member of the board of directors, and who signed the writing that put said bank out of business, together with said J. N. Alexander, one making the motion and the other seconding it, and in addition thereto the said J. Niles Boyd's mother is a sister to the wife of the presiding court, thus connected within the prohibited rule as provided for by law. Because, in addition to the reasons above given, J. Niles Boyd is indebted to the said defunct bank in a large sum, supposed to be in excess of thirty thousand dollars, and the court would be called on to adjudicate rights vitally affecting the financial interest of his wife's sister's son, the mother of J. Niles Boyd being a sister to the wife of the court. Because the court as a matter of law is disqualified to preside here and determine the issues involved in this suit. Because D. L. Brown is a brother-in-law of the chancellor, they having married sisters, and said D. L. Brown, so we are informed and believe, is a large depositor in said bank of deposit, and his claims and rights will of necessity have to be finally passed upon by the court. We further say on information and belief that the wife of the chancellor is a depositor or stockholder in said de-

funct bank. We further say on information and belief that Judge H. C. Niles is also a depositor in said defunct bank, and we say that he is related to the chancellor; said chancellor having married his sister. Wherefore they ask that said chancellor recuse himself, to the end that another chancellor or court may be selected as provided by law to hear and determine the matters involved in this cause."

The court, after hearing the same stated that the relationship named as to kinship by affinity in the motion was substantially correct; that he was not related to the corporation, and as to his interest or bias he knew that he had no interest or bias, and was free to give a fair trial to all parties involved.

"My wife has a deposit in that bank to the extent of about five hundred dollars, but that will have no influence with me, as she has enough money in other banks and real estate of her own that she does not spend the income of her property; and I have an independent income myself, and we have only one son, and he is married, able to take care of himself. I am not disqualified, and believe I can give everybody a fair trial in this case. I know J. Niles Boyd is related to me, he being a nephew of my wife in the manner set out in the motion, and I am not blood kin to anybody connected with the case; but as to him I understand he is solvent, ready, and able to pay the bank all he owes them, and if in the progress of the trial it shall develop that I am disqualified I will excuse myself."

After making the foregoing statement the chancellor signed the following order:

"S. L. Dodd, T. P. Guyton, and Others, v. C. C. Kelly and Others. No. 3138.

"ORDER OVERRULING MOTION.

"Came on this day the motion of the complainants in the above-styled cause asking the court to excuse

himself because of interest and relationship by affinity and consanguinity to the parties defendant in this cause, and the court having considered same, and being fully advised in the premises, overrules said motion. To which action of the court the petitioners excepted, and their exceptions were allowed; a special bill of exceptions being then prepared and signed and allowed. Ordered, adjudged, and decreed this the 16th day of February, A. D. 1914. JAMES F. McCOOL, Chancellor."

It will be noted that the assignment was a general assignment for the benefit of creditors, and that the petition of the assignees was drawn in strict conformity to section 120, Code of 1906. The chancellor stated that his wife and other relatives were creditors of the bank, but he would not be influenced by that fact. The learned chancellor was no doubt entirely sincere when he made this statement. (It may not be amiss for the writer to say that he also believes the statement was the literal truth.) However impartial the chancellor may be in fact, we must look to the Constitution of the state for the standard by which the qualifications of a judge to preside in a given case is alone measured. Many cases, discussing the disqualification of judges to preside at the trial of causes may be found in the books; but it is unnecessary to look elsewhere for authority upon that subject, when the Constitution of this state, in clear and simple language, points out when a judge is disqualified. Nothing can be added to or subtracted from the standard of measurement provided by the organic law.

The chancellor in this case admits that he is connected by affinity or consanguinity with parties to the proceedings he was controlling, and, this being true, he was disqualified, unless all of the parties consented. The first clause of section 165 of the Constitution reads:

"No judge of any court shall preside on the trial of any cause where the parties or either of them shall be connected with him by affinity or consanguinity, or

where he may be interested in the same, except by the consent of the judge and of the parties."

There seems to be no room for construction and no need for interpretation of language so simple. The record discloses that the wife of the chancellor was a party to the cause, she being a creditor of the assignor, and section 120, Code of 1906, requires the assignor and all creditors "must be made parties to the petition." It is our opinion that the chancellor was disqualified and should have recused himself, and the fact that the chancellor appointed E. Carr receiver does not in any way remove the disqualification.

A judge who is disqualified to preside on the trial of any cause cannot make any decision therein, right or wrong, except by the consent of the judge and of the parties.

Reversed.

WHEELER & SILBER v. BOGUE PHALIA DRAINAGE DISTRICT.

[65 South. 563—64 South. 375.]

COURTS. *Decisions of state courts. Review by supreme court.*

The supreme court will not after a case had been finally disposed of, enter an order, based solely on the recollection of the judges composing that court, that in reaching its decision the court did or did not take into consideration certain arguments advanced on points raised by counsel engaged in the cases especially where it cannot be determined upon what points the court agreed, because the matter was not considered in conference.

APPEAL from the chancery court of Washington county.

HON. E. N. THOMAS, Chancellor.

Drainage proceedings by the Bogue Phalia District. From a decree confirming an assessment by the drain-

age commissioners, Wheeler & Sibler appealed and the decree having been affirmed (64 So. 375) and a suggestion of error overruled without a written opinion, appellants moved for an order and certificate that a Federal constitutional question was raised on the suggestion of error, for the purpose of appealing to the United States supreme court.

The facts are fully stated in the opinion of the court.

SMITH, C. J., delivered the opinion of the court.

At the last term of this court the decree of the court below in this cause was affirmed (64 So. 375), and appellants afterwards filed a suggestion of error, one of the grounds of which was that the statute as construed by the court violated the first section of the fourteenth amendment to the Constitution of the United States. This suggestion of error was overruled without a written opinion. Appellants now come and move—

"the court for an order and certificate that the suggestion of error filed herein and passed upon by the court raised the question of the constitutionality of the drainage laws of Mississippi as construed by this court, and to show that under said suggestion of error the appellants presented to the court, and the court considered in passing upon the suggestion of error, the argument of appellants that section 1698 of the Code of 1906, as amended by chapter 196, page 226, of the Acts of 1912, and section 1700, as amended by chapter 196, page 226, of the Acts of 1912 and section 1702 of the Code of 1906, as amended by chapter 196, page 226, of the Acts of 1912, as construed by the court, violated section 1 of the fourteenth amendment to the Constitution of the United States. A copy of said order and certificate prayed for is attached herewith as Exhibits A and B hereto."

This order and certificate is desired for the purpose of an appeal to the supreme court of the United States. This motion must be overruled for two reasons: First,

we do not think it proper for the court, after a case has been finally disposed of, to enter an order, based solely on the recollection of the judges composing the court, that in reaching its decision the court did or did not take into consideration certain arguments advanced or points raised by counsel engaged in the cause. Second, the course pursued by us in overruling this suggestion of error was such that it is impossible for us to say on what points the court as a whole agreed in overruling it. The manner in which suggestions of error, as a rule, are handled by us is this:

When a suggestion of error is filed, it is examined by each members of the court for himself. If, after examining it, a member of the court thinks it should be overruled, and that there is nothing in it requiring a written opinion, he simply indicates that fact to the other members of the court; and if each of the others reach the same conclusion, the suggestion of error is overrueld without the judges having considered it together in conference. If any one of the judges thinks the suggestion of error requires a written response, it is then considered in conference, and the various points raised by it are discussed and decided. When any judge thinks, or is inclined to think, that a suggestion of error should be sustained, it is considered, and its disposition agreed on by the judges in conference. In the case at bar the above plan was pursued, and the suggestion of error disposed of without a conference of the judges with reference to the various points raised by it.

Overruled.

GASTON v. STATE.

[65 South. 563.]

CRIMINAL LAW. *Second offense. Punishment. Code* 1906, *chapter* 214. Where accused was tried for the unlawful sale of intoxicating liquors, as for a first offense, and the indictment did not charge a former conviction, he can only be punished as for a first offense under Laws 1912, chapter 214.

APPEAL from the circuit court of Choctaw county.

HON. J. A. TEAT, Judge.

Jack Gaston was convicted of unlawful retailing of intoxicating liquors and appeals.

The facts are fully stated in the opinion of the court.

Adams & Dobbs, for appellant.

The sentence imposed by the court was as for a second offense, and the indictment fails to charge that the alleged sale was a second offense; and therefore, the court was without power to impose the severer punishment. This honorable court held, in the case of *Hogget* v. *State,* 57 So. 812, that: "Where a greater punishment may be inflicted for a second subsequent violation of a penal law than for the first, the fact that the offense is for a second or subsequent violation must be directly averred in the information or indictment to justify the increased punishment," the court quoting from 10 Ency. Pl. & Pr., 489. This ruling was re-announced in the case of *Britton* v. *State,* 58 So. 530. The trial court did not have jurisdiction to render the particular judgment rendered against this appellant, and it is therefore void as to the sentence.

Geo. H. Ethridge, assistant attorney-general, for the state.

The part of the argument which argues that the sentence was excessive is as to that part sound and if this

was cause for a reversal, it should only be as to the sentence and not as to the question of guilt or innocence. I submit, however, that where the court, looking at the record, can see that the trial court desired to give the limit on imprisonment, that it would not be necessary to remand for a re-sentence where the limit had been exceeded by the trial court, but the court could enter an order here correcting the sentence, and I respectfully submit that this course ought to be followed in this case.

REED, J., delivered the opinion of the court.

Appellant was convicted on a charge of unlawfully selling intoxicating liquors, and as punishment therefor was sentenced to imprisonment in the county jail for six months.

We find that appellant was given a fair trial, that the court did not commit any error in the trial, and that the verdict of guilty is supported by the evidence.

The statute under which the indictment was returned is chapter 214 of the Laws of 1912. The punishment therein provided for the first conviction for an offense committed after the passage of the law is a fine of not less than fifty dollars nor more than five hundred dollars, and imprisonment in the county jail for not less than one week nor more than three months. If the conviction is for an offense under the statute committed after a conviction and punishment for a former offense thereunder, then the punishment is by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than sixty days nor more than six months.

In this case the indictment does not charge a former conviction of the offense. Appellant was charged, tried, and convicted as for a first offense. The court should not have sentenced appellant to imprisonment for six months. Under the statute, the imprisonment could not have been for a longer term than three months.

of this petition; that in pursuance of said resolution and said deed, your petitioners have taken charge of the assets of said bank, and are now engaged in preparing to present inventories of same to this court, as required by law. Your petitioners are ready and willing and will at once execute a bond as the court may designate as such assignees. The premises considered, your petitioners pray that all persons interested, both creditors and stockholders of said bank, be made parties hereto, and that your petitioners be accepted as receivers and assignees of said bank, and as such authorized and directed to take charge of same, and administer its affairs as hereinafter directed by the orders of this court, said receivers to execute a bond in the penal sum of four hundred and thirteen thousand, twelve dollars and four cents, same to be approved by the clerk of the chancery court. Petitioners pray the court that said receivers be allowed fifteen days in which to prepare and file said inventories. And in duty bound petitioners will ever pray."

On the same date the chancellor made the following order:

"State of Mississippi, County Attala.

R. E. Kelly and J. S. Niles v. C. C. Kelly Banking Company. No. 3137.

"The above cause this day coming on for hearing on petition of R. E. Kelly and J. S. Niles to be appointed as receivers of the C. C. Kelly Banking Company, and it appearing to the court that the said C. C. Kelly Banking Company have this day made a general assignment, to them for the benefit of its creditors without preferences, and it further appearing that they have taken charge of the property of said bank, it is ordered, adjudged, and decreed that they be and are hereby appointed as receivers of said bank, and as such they are directed to execute a bond conditioned according to law,

same to be approved by the chancery clerk in the penal sum of four hundred and thirteen thousand, twelve dollars and four cents, and it further appearing to the court that a short time will be necessary for them to prepare an inventory of the assets of said bank, they are therefore granted fifteen days in which to prepare and file same. Ordered, adjudged, and decreed on this the 14th day of February, 1914."

On the 16th day of February appellants filed a petition, which recited, among other things, the assignment of the bank, and charged that the assignees by reason of their relationship to the president and directors of the bank, and because of their youth, inexperience, and want of capacity were unfitted and disqualified to be receivers. This petition prayed for the appointment of E. Carr as receiver of the bank, and also prayed they, the assignees, Kelley and Niles, be restrained from exercising the functions of receivers and that all previous orders of the court conflicting with this prayer be rescinded.

On the same day the assignees answered the petition of appellants, denying generally the allegations thereof, and praying that the petition be dismissed, and that they be permitted to continue in the administration of the bank's affairs. On the same day the assignees filed another petition and asked the appointment of E. Carr as coreceiver. On the same day the chancellor made an order granting the prayer of the assignees for the appointment of E. Carr as coreceiver. Whereupon appellants filed the following motion:

"Come the complainants in the above-styled cause, by their attorneys, and ask the chancellor, Hon. Jas. F. McCool, to recuse himself from sitting as chancellor in the trial of the issues involved in this cause, for the reason that said chancellor is disqualified under section 165 of the Constitution of the state of Mississippi to preside, because he is connected by affinity and con-

his new automobile from Withers; but Withers did not enter into the arrangement.

Appellant then got in communication with the Baker-McDowell Hardware Company, of Natchez, Mississippi, who were dealers in automobiles. This company sent one of its traveling men, Mr. Liddell, to Insmore, the home of the appellant, and, as a result of Mr. Liddell's trip, appellant became the owner of an E. M. F. car for the sum of one thousand dollars, and the Baker-McDowell Hardware Company took appellant's Buick in the trade for nine hundred dollars, and at the same time sold it to the state for the use of the penitentiary farm for the sum of nine hundred dollars, agreeing to wait for payment until the money was available in the penitentiary fund. The balance of the purchase price, one hundred dollars, was charged to appellant on the books of the Baker-McDowell Hardware Company, and afterwards credited back to him by reason of certain repairs, etc., which he claims to have made on the E. M. F. machine.

While Mr. Liddell was at Insmore negotiating a deal with appellant, and, according to appellant's testimony, after Liddell had agreed to take the Buick at nine hundred dollars appellant suggested to Liddell that the penitentiary farm needed a secondhand car, and that Col. Montgomery, another one of the penitentiary trustees, had been instructed to buy one, and that Col. Montgomery wanted to buy a Buick, and that, if he would take the matter up with Col. Montgomery, he might be able to sell this Buick to him. Thereupon Col. Montgomery was called over the telephone and talked to Liddell, who told him that he was at Insmore, and that Mr. Smith had told him that the state needed a secondhand automobile, and that he (Liddell) had a Buick which he could recommend, and which he would sell to the state for nine hundred dollars. Mr. Smith then went to the telephone and told Col. Montgomery that he knew the car and had driven it, and that it was well worth the money, and

that he would recommend the purchase of it. Whereupon Col. Montgomery agreed over the phone to purchase the Buick, and it was agreed that Smith would drive the Buick through Edwards, Mississippi, the home of Col. Montgomery, and the latter would join him there, and they would drive to the state penitentiary farm at Tchula. Col. Montgomery never knew that the Buick automobile had ever been the property of Smith; but he had relied upon what both Liddell and Smith had said about the car being all right. Col. Montgomery testified that in his opinion the car was worth the money. Mr. Alexander, the manager of the Baker-McDowell Hardware Company, testified that Mr. Liddell called him over the telephone from Insmore and told him that he had made a deal with Smith to sell him an E. M. F. car for one thousand dollars, and allow Smith nine hundred dollars for his Buick, and that the state would take the Buick, provided the hardware company would wait for the money until the following February, when the funds would be available, as the current appropriation had been exhausted. Alexander agreed to the terms of the trade, and testified that the Buick was never delivered to the hardware company at all, but that under the agreement Mr. Smith kept the Buick, and was to drive it to the state farm.

Alexander testified that E. M. F. car which he sold Smith cost one thousand and twenty-seven dollars f. o. b. Natchez, which was wholesale price, but he was selling all of his automobiles, as he was going out of the automobile business, and was anxious to get rid of them as rapidly as possible.

A few days thereafter appellant drove the automobile from Insmore to Edwards, where Col. Montgomery joined him, and the two started together in the automobile for the state penitentiary farm at Tchula. After traveling about sixty miles, the automobile broke down. Several efforts were made to repair it, without result. The automobile was placed under a shed on a plantation near

the place where the brakedown occurred, but was afterwards rolled from under the shed and allowed to remain in the weather for several months. Subsequently it was shipped by freight to the state farm, but was never used to any extent. Its value is estimated by various witnesses for the state at from one hundred and fifty to three hundred and fifty dollars. Defendant and his witnesses testified that it was worth from eight hundred to one thousand dollars.

At the meeting of the penitentiary trustees in March, 1913, the account of the Baker-McDowell Hardware Company for nine hundred dollars was presented and allowed; Messrs. Smith and Montgomery voting for the allowance, and the other trustee, Taylor, voting in the negative.

No resolution authorizing the purchase of this automobile appears on the minutes; but, according to defendant's testimony, the resolution instructing Col. Montgomery to purchase a secondhand automobile was verbal. No advertisement was ever made for competitive bids to be submitted, as is required by statute when the state purchases supplies for the penitentiary.

The case was submitted to a jury on the instructions hereinafter set out, and resulted in a conviction.

STATE'S INSTRUCTIONS GIVEN.

(1) The court instructs the jury for the state that you are the sole judges of the credibility of the witnesses who have testified before you in this case, and, if you believe any witness or witnesses have willfully and corruptly sworn falsely to any material matter in this case, then you may wholly disregard the testimony of such witness or witnesses in making up your verdict.

(2) The court instructs the jury for the state that, if you believe from the evidence in this case beyond all reasonable doubt that the defendant, C. C. Smith, in his capacity as trustee of the state penitentiary, voted for an

order to pay Baker-McDowell Hardware Company the sum of nine hundred dollars ($900) of the state's funds for the purchase of the automobile in question, and that said sum of money was paid in accordance with such order, and that at the time of such purchase the defendant knew that nine hundred dollars ($900) was greatly in excess of the value of said machine, then it is the sworn duty of the jury to return the following verdict: "We, the jury, find the defendant guilty as charged in the indictment."

(3) The court instructs the jury for the state that, if you believe from the evidence beyond a reasonable doubt that under the contract made for the sale of a Buick car to the state, that it was to be delivered by the defendant, C. C. Smith, at the penitentiary farm at Tchula in good condition, then the sale was not completed until such delivery at Tchula in good condition; and if you further believe from the evidence beyond all reasonable doubt that it was not delivered at the penitentiary farm at Tchula in good condition, and that the sum of nine hundred dollars was a grossly exorbitant price for the automobile at the time it was paid for by the trustees of the state penitentiary, and that the defendant, knowing the price grossly exorbitant, voted to pay said sum of nine hundred dollars to the Baker-McDowell Hardware Company, and that said sum was paid by the state, then it is the sworn duty of the jury to find the defendant guilty as charged.

INSTRUCTIONS GIVEN DEFENDANT.

(1) The court instructs the jury for the defendant in this case that the value of the car in question must be determined as of the 8th day of October, 1912, the date on which the sale was made to the state of Mississippi, unless the jury believe from the evidence beyond all reasonable doubt that under the contract it was to be delivered by the defendant, C. C. Smith, at Tchula, Mississippi, in good condition.

(2) The court instructs the jury for the defendant that there are two necessary ingredients of a crime, to wit, a criminal act, and a criminal intent; and, in order for a man to be guilty of a crime, he must do an unlawful act, and there must be coupled with and accompanying the unlawful act a criminal intent to commit the crime charged. The criminal intent is just as necessary as the unlawful act, so that in this case the court charges you on behalf of the defendant that the burden of proof is on the state to prove beyond all and every reasonable doubt that the defendant intended to defraud the state, before you can convict him, and if, after considering all the tesmony in this case, there is a reasonable doubt from the testimony, or for the want of testimony, that the defendant, Smith, intended to defraud the state, then it is your sworn duty under your oaths to return into this court the following verdict: "We, the jury, find the defendant not guilty."

(3) The court instructs the jury for the defendant in this case that the law presumes every person who is charged with crime to be innocent of the whole crime and every part of it. It is incumbent upon the state to prove by credible witnesses beyond all reasonable doubt that one charged of the crime is guilty. The presumption of innocence clothes and protects the defendant from all suspicion, malice, or prejudice, if any, and stands as a witness in his behalf throughout the course of the trial, and during your deliberations in the jury box; and before you can lawfully convict the defendant, the presumption of innocence must be overcome by credible testimony.

(4) The court instructs the jury for the defendant that the law presumes the defendant innocent of the whole crime charged and every part of it. The burden is on the state to prove the defendant guilty beyond every reasonable doubt arising from the evidence or the want of evidence, and this burden of proof on the state never shifts to the defendant, but continues with the state

throughout the entire course of the trial. The defendant is never, under the law, required to prove and excuse or to prove his innocence of the crime charged or any part of it.

(5) The court instructs the jury for the defendant in this case that, if there is a probability of the defendant's innocence, then there is a reasonable doubt of his guilt, and under circumstances the law requires an acquittal at your hands.

(6) The court instructs the jury for the defendant in this case that, if there is a probability of the innocence of the defendant, then a reasonable doubt of his guilt exists, and the jury must acquit him.

(7) The court instructs the jury for the defendant that, before you are warranted, under the law, in convicting the defendant in this case, it is incumbent upon the state of Mississippi to prove each and every material allegation in the indictment beyond every reasonable doubt.

(8) The court instructs the jury for the defendant that suspicion, however strong, will not warrant the jury in finding the defendant guilty, but that, before you can convict the defendant, under the law, you must believe from the evidence beyond every reasonable doubt that the defendant is guilty as charged in the indictment.

(9) The court instructs the jury that, if you believe from the evidence that the delivery of the automobile in question was to be to C. C. Smith, at Insmore, Mississippi, instead of Tchula, Mississippi, and that the said automobile was delivered to the said C. C. Smith, at Insmore, Mississippi, then under the law, the contract of sale and delivery was full and complete.

(10) The court instructs the jury for the defendant that, unless they believe from the evidence in this case beyond all reasonable doubt that the automobile in question was not reasonably worth nine hundred dollars at the time it was sold to the state of Mississippi in October, 1912, and that the defendant knew it was not worth that sum at that time, they will find the defendant not guilty,

notwithstanding the fact that they may further believe from the evidence that since the sale to the state the car has deteriorated in value, and is not worth nine hundred dollars, unless the jury believe from the evidence beyond all reasonable doubt that under the contract it was to be delivered by defendant, C. C. Smith, at Tchula in good condition.

(11) The court instructs the jury for the defendant in this case that, before you can find the defendant guilty of the offense charged in this indictment, you must believe from the evidence beyond all reasonable doubt that the defendant, C. C. Smith, willfully, fraudulently, and feloniously purposed and intended to cheat and defraud the state of Mississippi out of the sum of nine hundred dollars, or some part thereof, and that in pursuance of such purpose and intention he knowingly, willfully, fraudulently, and feloniously sold or participated in the purchase of the automobile in question by the state of Mississippi at exorbitant and unreasonable price, and for a price the said C. C. Smith knew at the time of the sale and purchase to be exorbitant and unreasonable.

(12) The court instructs the jury for the defendant in this case that the gist of the offense charged is fraud, and that the defendant is not charged with any offense of buying or participating in the buying for the state of Mississippi of an automobile from the lowest bidder, or for buying a car which was not a necessary supply for the state penitentiary.

Watkins & Watkins and *Butler, Easterling & Potter,* for appellant.

Powell & Thompson and *Geo. H. Ethridge,* assistant attorney-general, for the state.

REED, J., delivered the opinion of the court.

Appellant, a trustee of the Mississippi penitentiary, was indicted, tried, and convicted on the charge of committing a fraud on the state.

The fraud charged against appellant was alleged to have consisted in his buying and participating in the buying of an automobile from himself and Baker-McDowell Hardware Company of Natchez, and in his assisting in causing and procuring the payment for the automobile by the state then knowing that it had not been purchased as provided by law, and that the price thereof was exorbitant and unreasonable.

Appellant and two other trustees had general supervision of the state penitentiary and management of the business and affairs of the penitentiary farms. To appellant and his associates was committed the duty of purchasing necessary supplies for the use of the penitentiary.

Appellant owned a Buick automobile. This car had been the property of R. S. Withers, an automobile dealer in Jackson, Mississippi. Withers purchased it July 15, 1910. He sold it to Dr. Crook, of Jackson, who in turn sold it to W. L. Brown, of the same city. In September, 1911, Mr. Withers again acquired ownership of the car. On September 28, 1911, he sold it to appellant for five hundred dollars, of which amount, one hundred dollars was paid in cash; the balance was on credit. Appellant took the car to his plantation at Insmore, Mississippi. He used it till October 8, 1912, when, through a trade or deal with the Baker-McDowell Hardware Company, it was sold to the state for the price of nine hundred dollars. Shortly afterwards appellant, with another trustee, endeavored to deliver the automobile to the state farm at Parchman. It seems to have been the purpose at first, when the sale was negotiated, to deliver it to the farm at Tchula. On the way the car broke down and was abandoned. It remained where it had broken down for several months. Finally after being repaired, it was shipped by railroad to Parchman. It was used scarcely at all after the breakdown, and thereafter was of small value. Pursuant to allowance of the account by the trus-

tees, a warrant for nine hundred dollars was issued to the Baker-McDowell Hardware Company in payment for the automobile. The allowance was made March 4, 1913, after the automobile had been left on the way, disabled.

We will not enter into any discussion or review of the evidence in the case. It is voluminous. Many witnesses were examined. There is much testimony, *pro* and *con*, relative to the value of the automobile, the sale to the state, the place of delivery, the reputation of appellant, and so on. A careful reading of the record convinces us that there was ample evidence to support the verdict of the jury. In truth it is manifest to us that the jury returned the only right verdict.

We do not find in the record any reversible error. It is claimed that the demurrer to the count in the indictment on which appellant was tried should have been sustained. From our view of the case, the indictment is sufficient. It is difficult to define fraud. In its commission there are devices "almost infinite in variety." As it involves breach of duty, trust, or confidence, it includes all acts, omissions, or concealments by which another is injured, or an undue and unconscientious advantage is taken. The statement in the indictment of the acts constituting the offense, fraud, is made sufficiently direct, clear, and concise, and furnished appellant an intelligible description of the charge upon which he was tried.

It is contended that error was made in giving instructions. Three instructions were given for the state. Against two of these there is complaint. It appears to us that in both instructions, the second and third, the issue presented by the indictment and proof is somewhat narrowed, but not to the prejudice of appellant. These instructions directed the law to evidence which we find in the record. In this trial on the charge of fraud alleged to have been committed by appellant, a state officer, against the state, each of the two instructions presented facts, which, if the jury believed, were sufficient to support a conviction.

Twelve instructions were given for appellant. Taken and construed together, they sufficiently announce the law pertinent to appellant's defense.

Construing all of the instructions used in the case together, and considering them as a whole, we believe the law applicable was fairly given.

Appellant had a fair trial of his case. We will not disturb the jury's verdict.

Affirmed.

SMITH, C. J. (dissenting).

I am unable to concur in the affirmance of the judgment of the court below in this cause, and will set forth as briefly as I can my reasons therefor.

Appellant was a member of the board of trustees of the state penitentiary; the other members thereof being W. A. Montgomery and Leroy Taylor. The indictment upon which he was convicted charged that:

He "did then and there willfully, wantonly, fraudulently, and feloniously, while acting and serving as a member of the board of trustees of the penitentiary of the state of Mississippi, caused to be bought and participated in the buying of a certain automobile of and from Baker-McDowell Hardware Company, Incorporated, of Natchez, Mississippi, and of and from himself the said C. C. Smith, and then and there willfully, feloniously, fraudulently, and wantonly caused and procured and assisted in the cause and procuring the said automobile to be paid for by the state of Mississippi by a requisition in writing for the sum of nine hundred from the state treasury of Mississippi. . . . And that the price paid for the said automobile was well known to the said C. C. Smith to be exorbitant, unreasonable, and a fraud upon the state. By which said willful, wanton, fraudulent and felonious purchase, . . . the state of Mississippi was willfully, . . . feloniously cheated and defrauded . . . out of the sum of nine hundred dollars," etc.

The statute under which the indictment was found is section 1144 of the Code of 1906, which reads as follows:

"If any officer, or other person employed in any public office, shall commit any fraud or embezzlement therein, he shall be imprisoned in the penitentiary not more than ten years, or in the county jail not more than one year, or be fined."

In order that we may clearly appreciate the effect of the errors which, in my judgment, were committed on the trial in the court below, it will be necessary for us to bear in mind that, in order to constitute the crime defined by this section, the act committed must have been prompted by an intent to defraud, and that, in the absence of such an intent, the act, though never so harmful, will be either an innocent one or constitute at most a misdemeanor. In the language of the brief of the attorney-general:

"In the present case the intent is the gist of the case, and is the thing that raises it from a misdemeanor to the grade of a felony. In other words, the act without the intent would be a misdemeanor, and the act with the intent was a felony."

The facts upon which the guilt or innocence of appellant depend are as follows:

In September, 1911, appellant purchased from Mr. R. S. Withers an automobile for the sum of five hundred dollars. He kept and used this automobile until October 1912, when it was sold to the state for the sum of nine hundred dollars by Baker-McDowell Hardware Company, to which Smith had previously sold it.

According to the state's contention, this sale was the result of a scheme entered into by Smith and Baker-McDowell Company to sell the automobile to the state at a grossly excessive price. The parties participating in this sale were the appellant himself, H. M. Alexander, president, and P. B. Liddell, an employee, of Baker-McDowell Hardware Company, and Col. W. A. Montgomery, one

of the trustees of the state penitentiary. According to their testimony, this sale came about in this way. Liddell, acting under instructions from Baker-McDowell Hardware Company, went to Insmore, appellant's place of residence, in order to sell to him, if possible, a secondhand automobile owned by that company, and, as a result of his negotiations with Smith, he swapped this automobile to Smith for his—the one afterwards sold to the state—Smith to pay one hundred dollars in cash in addition, the Baker-McDowell automobile to be delivered to Smith, at Insmore, and Smith's automobile to be delivered to Baker-McDowell Company at Natchez.

A few hours after this trade had been closed, according to the testimony of Liddell and appellant, appellant suggested to Liddell that the automobile taken by Baker-McDowell Company in exchange for the one owned by it might be sold to the state, as W. A. Montgomery had been directed to purchase one for one of the penitentiary farms. Appellant thereupon called Montgomery over the long-distance telephone, told him of the automobile, recommended its purchase, and then turned the telephone over to Liddell, who then sold the automobile to Montgomery for the sum of nine hundred dollars, and according to his testimony, and that of Montgomery, and that of Smith, was to deliver the automobile to Smith, at Insmore. Montgomery, either then or a few minutes afterwards, reminded Smith over the telephone that the appropriation for the support of the penitentiary has been exhausted, and they could not purchase the automobile, unless Baker-McDowell Company would wait until the appropriation for the next year was available. Smith thereupon called up Alexander, president of this company, explained the situation to him, and Alexander agreed that they would wait for their money until the appropriation for the next year was available.

Prior to this time, according to the testimony of appellant and of Montgomery, the purchase of an automo-

bile for one of the penitentiary farms had been determined on by them, and Montgomery instructed to purchase it; but no record thereof was entered on the minutes of the board of trustees. The other trustee did not participate in the authorizing of this purchase. The automobile was purchased with the intention on the part of Montgomery and Smith of using it at Belmont, one of the state farms located near Tchula; but afterwards it was determined to take it to Parchman. Montgomery then, according to his testimony and that of appellant, telephoned appellant to come to Edwards Montgomery's place of residence, in the automobile, and that they, appellant and Montgomery, would take it from there to Parchman. This appellant did about ten days after its sale to the state, and he and Montgomery started through the country to Parchman. The automobile broke down on the way, and they, being unable to proceed further with it, left it under a shed in charge of a Mr. E. B. Moore, and directed Mr. Lee Richardson, the owner of a garage in Vicksburg, to have it repaired. The automobile remained in that place for several months; was permitted to remain in the weather, and some parts of it to be broken by cattle. Richardson during this time sent three different men there to repair it, and the evidence varies as to the results accomplished by them; but suffice it to say that the automobile was finally transported to Parchman by rail, and has never since been in such condition that it could be used, and has, most of the time, been neglected and exposed to the weather, and at the time of the trial was practically worthless.

In March, 1913, the account of Baker-McDowell Company for the automobile was presented to the board of trustees, allowed, and paid; Smith and Montgomery voting therefor, the other trustee voting, if at all, in the negative.

The evidence as to the value of this automobile at the time of its sale to the state in October, 1912, was in hope-

less conflict, and that fact was one solely for the determination of the jury. There was evidence tending to show that at the time of the purchase of this automobile by Smith it was worth very much more than five hundred dollars, and tending to explain why it was that he was enabled to purchase it for that sum. There was also evidence in contradiction thereof.

In order for appellant to be convicted under this indictment, it was necessary for the jury to find as a fact that nine hundred dollars was, and to the knowledge of Smith, a grossly excessive price for the automobile at the time of its purchase. If it was sold to the state at a fair valuation, and in good faith, though unlawfully, in that the statute regulating purchasers by the state was not pursued, appellant is not guilty of the felony charged, even though at the time he voted to pay for the automobile it had decreased so much in value that the price paid was then grossly excessive. In my judgment therefore, the court below erred in refusing the following instructions requested by appellant:

"The court instructs the jury for the defendant that the value of the car in this case must be determined as of the 8th day of October, 1912, the date on which the sale was made to the state of Mississippi."

And:

"The court instructs the jury for the defendant that, unless they believe from the evidence in this case beyond all reasonable doubt that the automobile in question was not worth nine hundred dollars at the time it was sold to the state in October, 1912, they will find the defendant not guilty, notwithstanding the fact that they may further believe from the evidence that since the sale to the state the car had deteriorated in value, and is not worth nine hundred dollars."

It is true that, without reference to the value of the automobile, appellant may have been guilty of a misdemeanor by reason of is sale to the state; but he was not

indicted for having committed a misdemeanor, but for the felony defined in the section of the Code hereinbefore set forth. After refusing these instructions, the court granted the state's third instruction, which reads as follows:

"The court instructs the jury for the state that, if you believe from the evidence beyond a reasonable doubt that under the contract made for the sale of a Buick car to the state, that it was to be delivered by the defendant, C. C. Smith, at the penitentiary farm at Tchula in good condition, then the sale was not completed until such delivery at Tchula in good condition; and if you further believe from the evidence beyond all reasonable doubt that it was not delivered at the penitentiary farm at Tchula in good condition, and that the sum of nine hundred dollars was a grossly exorbitant price for the automobile at the time it was paid for by the trustees of the state penitentiary, and that the defendant, knowing the price grossly exorbitant, voted to pay said sum of nine hundred dollars to the Baker-McDowell Hardware Company, and that said sum was paid by the state, then it is the sworn duty of the jury to find the defendant guilty as charged."

It will be observed that this instruction eliminated from the consideration of the jury practically all of what occurred at Insmore, or to be more accurate, permitted the jury, even though it should believe that what occurred at Insmore was done in good faith, and that the automobile then was worth nine hundred dollars, to find a verdict of guilty if it had so decreased in value by the time it was paid for that nine hundred dollars was then a grossly exorbitant price for it. It is clearly erroneous, first, because it permits a conviction without reference to a fraudulent intent on the part of appellant in voting for the payment of the automobile; second, because there was no evidence that Smith agreed to deliver the automobile at Tchula; and, third, even had there been such evi-

dence, delivery at Tchula was waived by Smith and Montgomery.

If this automobile was, in fact, purchased in good faith in October, 1912, to be delivered at a future date, and when delivered was worth less than the purchase price, Smith may have acted wrongfully in voting for its payment, and the fact that he did so vote may be evidence of a fraudulent intent on his part in so doing; but this intent should have been found as a fact by the jury, and should not have been assumed as matter of law by the court. Moreover, he was not indicted for fraudulently voting for the payment of an automobile, but for the fraudulent purchase of one; and his voting to pay was material only as showing the consummation of a fraudulent purchase.

The record wholly fails to disclose any evidence that this automobile was to have been delivered at Tchula. In one of the briefs of counsel for appellant it is stated that such evidence appears in "the testimony of Kinsman on page 449 of the record, and Exhibit 3 to his testimony, or Exhibit B, on page 490 of the record," and in "the testimony of Mr. Alexander, of the firm of Baker-McDowell Hardware Company." Kinsman knew nothing whatever of his own knowledge about this. He was secretary and treasurer of the Baker-McDowell Hardware Company, and exhibited its books containing the account of the state with this company showing the sale to it of this automobile, and following the entry thereof appeared a memorandum, "Delivered at Penitentiary Farm at Tchula, Mississippi." He stated that this was a transcribed entry; that he did not know how it came to be made, or from what book it was transcribed. This evidence was objected to by appellant, was incompetent, and should not have been admitted, and, even if competent, is insufficient of itself alone to establish, as against appellant, the fact that delivery was to be made at Tchula. All that Alexander testified to was that the au-

tomobile, was to be delivered "to the prison board of trustees," and that this delivery was to be made by Smith. On the other hand the only three persons who have any real knowledge of the place of delivery are Smith, Montgomery, and Liddell; and all three of them testified that delivery was to be made to Smith at Insmore.

It may be that the jury would had been warranted in believing that there was, in fact, no sale to the Baker-McDowell Company, and by it to the state, but that all that occurred in fact was that Smith himself sold the automobile to the state at a grossly exorbitant price in order to use the money thereby obtained in a purchase from Baker-McDowell Hardware Company of a new one, had that question been submitted to them under proper instruction; that this was not the question submitted to them by the instruction here under consideration, and a conviction was asked and obtained, without reference to that question at all. Even had there been an agreement to deliver the automobile at Tchula, Smith and Montgomery, by taking charge of it and starting to Parchman, waived that agreement in so far as Baker-McDowell Hardware Company was concerned, and if in so doing they acted in good faith, even though without authority so to do, no fraud would have been thereby perpetrated upon the state; and, in the absence of a fraudulent intent relative thereto, such waiver cannot constitute an element of the crime here charged.

In all that I have said with reference to the conduct of appellant, I have not meant to imply that he was guilty of no wrong, nor that he may not have been guilty of a crime; but what I do mean to say is that he was guilty of the crime here charged only in event that his acts were prompted by a fraudulent intent, and that the existence of this intent was a question for the determination of the jury.

The theory of counsel for the state is that this instruction was not erroneous, for the reason that guilt could

be predicated alone upon appellant's voting for the payment of the machine at a time when it was to his knowledge worth less than the price paid. And this was the theory upon which they attempted to have the case tried, as evidenced by instructions presented to and refused by the court below.

Their contention is stated in one of the briefs as follows:

"We contend that the board as a board never agreed to purchase this machine until they paid for it in March following the transaction; that Col. Taylor never was consulted in regard to the matter at all; that no order was ever placed upon the minutes authorizing the purchase; that no requirements of the statute were complied with in the purchase; and that the transaction was never in legal contemplation completed until the actual payment of the money by the trustees in February or March of the year 1913, at which time the machine was absolutely and confessedly worthless. And if at that time defendant, Smith, voted to pay for a machine a price which he knew was grossly and patently in excess of its value, then he then and there committed a fraud upon the state, for he was a trustee of the state and bound to protect its interests.

"He had been largely trusted by the people, and should have seen that the state treasury was not plundered, and the fact that he did not do so, but with full knowledge voted for an excessive payment out of the funds that had been intrusted to his care, was a fraud in law and morals, and was so even irrespective of any statutes upon the subject."

The vice in this reasoning is that, conceding that the statute was violated in the purchase of the automobile, the felony here charged was not committed, unless the violation was prompted by an intent to defraud, and if the trustees believed in good faith that they had already purchased the automobile, and voted for its pay-

ment upon that theory, then the felony charged was not committed, even though it may have afterwards decreased in value.

The second instruction granted at the request of the state was as follows:

"The court instructs the jury for the state that, if you believe from the evidence in this case beyond all reasonable doubt that the defendant, C. C. Smith, in his capacity as trustee of the state penitentiary, voted for an order to pay Baker-McDowell Hardware Company the sum of nine hundred ($900) dollars of the state's funds for the purchase of the automobile in question, and that said sum of money was paid in accordance with such order, and that at the time of said purchase the defendant knew that nine hundred ($900) dollars was grossly in excess of the value of said machine, then it is the sworn duty of the jury to return the following verdict: 'We, the jury, find the defendant guilty as charged in the indictment.' "

This instruction, in addition to its failure to predicate guilt upon a fraudulent intent, was calculated to mislead the jury when read in connection with the state's instruction No. 3, hereinabove set out, into believing that the value of the machine was not to be determined as of the date of its purchase at Insmore, but as of the date on which appellant voted for its payment; and the error in so wording the instruction was emphasized by the modification made by the court to appellant's tenth instruction. This instruction as requested was as follows:

"The court instructs the jury for the defendant that, unless they believe from the evidence in this case beyond all reasonable doubt that the automobile in question was not reasonably worth nine hundred dollars at the time it was sold to the state of Mississippi in October, 1912, and that the defendant knew it was not worth that sum at that time, they will find the defendant not guilty, notwithstanding the fact that they may further believe from

the evidence that since the sale to the state the car has deteriorated in value, and is not worth nine hundred dollars."

And the modification consisted in adding thereto the following:

"Unless the jury believe from the evidence beyond all reasonable doubt that under the contract it was to be delivered by defendant, C. C. Smith, at Tchula, Mississippi, in good condition."

In order to establish appellant's fraudulent intent, the state introduced testimony showing that this automobile was not purchased in the manner in which the state claimed was contemplated by the statute; that is, that it was purchased by these trustees, without an advertisement for competitive bids therefor having been made. In order to show that this violation of the statute, if such it was, was committed in good faith, and with no fraudulent intent, appellant sought to prove on the cross-examination of Leroy Taylor, one of the trustees and a witness for the state, but, on objection by the state, was not permitted to do so, that since the organization of the board of trustees the statute had been uniformly construed by the executive officers of the state, including the attorney-general, as not requiring an advertisement for bids for the purchase of property of the character here under consideration. This evidence should have been admitted, for, as I have hereinbefore stated, the fact that a misdemeanor may have been committed does not warrant a conviction for the felony charged, unless the misdemeanor resulted in a fraud upon the state, and was prompted by a fraudulent intent.

The testimony with reference to the sale of this automobile by Withers to Smith all showed that the sale was intended to be for cash; that credit therefor was neither asked by Smith nor promised by Withers. Over the objection of appellant, the state was permitted to prove that Smith did not, in fact, pay for the automobile

at the time of its purchase, and that at the time of the trial he probably owed a balance on it. He seems to have had a running account with Withers which aggregated about seven hundred dollars, and at the time of the trial there was due on this account the sum of about one hundred dollars. This evidence was probably admissible in order to contradict Withers and Smith, and to show that the sale, in fact, was made on a credit basis, and therefore that the cash price of the automobile at that time was less than five hundred dollars; but granted that it was erroneously admitted, I do not think appellant sustained any substantial prejudice thereby.

The trial in the court below was had nearly a year after the sale of the automobile to the state, and after it had received the treatment which I have hereinbefore set out. Over the objection of appellant, the state was permitted to prove by witnesses who had inspected the automobile a few days previous to the trial that it was then practically worthless. This evidence should not have been admitted. It was admitted, I presume, on the theory that it tended to establish the value of the automobile at the time of its purchase; but, if there is any presumption that the value of an article to-day is the same that it was at any given previous time, it must be shown that it is to-day in the same condition that it was on the previous occasion. It cannot be said that, if the automobile was practically worthless at the time of the trial, this evidenced the fact that it was of little value when purchased because, had it not been so, it would not have deteriorated so greatly in value in that time, for the reason that the evidence shows that it was handled after its purchase in an unusual manner, and in such a way as would probably have rendered even the best of automobiles practically worthless.

Several months after the automobile had been left by Smith and Montgomery with Moore it was shipped by rail to Parchman, and the state, over the objection of

appellant was permitted to prove that the freight thereon was paid by the board of trustees, and also to prove that after it reached Pacrhman an attempt was made to repair it, and the expense thereof was paid by the board of trustees. This evidence should not have been admitted, as it could have no bearing on the good faith of the transaction which occurred at Insmore. I presume that it was admitted on the theory that the car had never been delivered, and that any expense attached thereto should have been borne by Smith or Baker-McDowell Company, and not by the trustees, and therefore tended to show a fraudulent intent in the original purchase of the car. As I have hereinbefore pointed out, the delivery, in so far as this case is concerned, was completed at Insmore.

The indictment contained originally a count charging appellant with the commission of a felony because of his having voted for the payment of these items; but a demurrer was interposed thereto and sustained.

For these reasons, I think the judgment of the court below should be reversed, and a jury, upon proper evidence, and under proper instructions be permitted to pass upon the *bona fides* of the transaction which occurred at Insmore, for appellant's guilt *vel non* of the felony, with the commission of which he is charged, depends solely upon the solution of that question; and it, by the instructions hereinbefore referred to, and which were not cured by any of the other instructions granted was, in my judgment, entirely withdrawn from the jury's consideration.

BLYTHE *v.* SIMMONS *et al.*

[65 South. 571.]

1. EQUITY. *Decree. Conformity to pleadings. Bill.*

Where complainants filed a bill in chancery against defendant and a bank, in which it was alleged that defendant had procured complainant to execute their notes by fraud and had negotiated them to the bank, which took with notice, and which had brought suit thereon, and the relief prayed for was to restrain the suits on the notes and for their surrender; and that defendant be decreed primarily liable to the bank and that the bank's remedy against him be first exhausted, and that complainants might have a decree over against defendant for any amount for which they were adjudged liable, and generally for other relief, in such case there being no showing that complainant had been compelled to pay anything on the notes, or had yet been otherwise damaged by their execution, a decree requiring defendant to pay complainant the amount of the notes, was improper as not within the prayer for relief nor supported by the allegations of the bill.

2. EQUITY. *Pleading. Bill.*

Only such decree can be entered as is supported by the allegations of the bill.

3. FRAUD. *Damages. Evidence. Sufficiency.*

Where a defendant fraudulently induced complainants to execute notes which were negotiated to a bank, the fact that complainant adjusted their difference with the bank, which was suing on the notes, will not entitle complainant to recover the full amount of the notes from the defendant, where it did not appear how the settlement was made or what amount was paid the bank pursuant thereto.

APPEAL from the chancery court of Newton county.

HON. SAM WHITMAN, JR., Chancellor.

Bill by J. M. Simmons and others against J. E. Blythe and others. From a decree of complainants, defendant Blythe appeals.

The facts are fully stated in the opinion of the court.

J. A. Cunningham and *Anderson & Long,* for appellant.

The position taken by counsel for appellees in their brief that where chancery court takes jurisdiction, the court may grant different relief from that specifically prayed for under the prayer for general relief, has its limitation, and we quote this from *Learned* v. *Holmes,* 49 Miss. 290, cited and relied upon by them, viz.: While it is quite true that equity jurisdiction once acquired, will be retained for all the purposes of the bill, including in a proper case, an adjustment of damages, yet it must be borne in mind that the jurisdiction for compensation or damages does not attach in equity, except as an incident or auxilliary to some other relief (*Scott* v. *Bilgerry,* 40 Miss. 119; 2 Story Eq. Jur., secs. 794 to 799; Willard's Eq. Jur., 309), nor where there is an adequate remedy at law, does fraud confer it. In most misrepresentations and frauds, there is an adequate remedy in damages at law. In such cases equity will not interfere, and of this class is the case at bar. These familiar rules will be completed by repeating their converse, that fraud will give this jurisdiction in cases where there is no adequate remedy at law." See citations thereunder by the court.

Counsel very adroitly pass around this other limitation, which we think certainly bars their rights under the rule relied upon by them. This limitation is that the relief so granted must be entirely consistent with the pleadings, and so that it shall not be a surprise to the defendants. This is announced in the case of *Bell* v. *Clark et al.,* 14 So. 318, from which we quote the following in point, to wit: It was formerly the rule in equity that no relief could be granted under the general prayer which was inconsistent with that specially prayed. *Wymouth* v. *Boyer,* 1 Ves. Jr. 416; *Palk* v. *Lord Clinton,* 12 Ves. 48; *Walpole* v. *Lord Orford,* 3 Ves. 402; *Grimes* v. *French,* 2 Atl. 141; *Kernegay* v. *Carroway,* 2 Dev. Eq. 403.

In modern practice, the rule is more liberal, and under the general prayer any relief consistent with the bill, and within its scope, may be afforded, though it be inconsistent with the specified relief prayed. *Dodge* v. *Evans,* 43 Miss. 570; *Mhoon* v. *Wilkerson,* 47 Miss. 634. But relief must yet be such as can be afforded on the facts stated, and it must appear that the defendant is fairly apprised by the bill that the relief is sought by the complainant. *Weeks* v. *Thrasher,* 52 Miss. 142. Mrs. Dozier is entitled to no relief, and the only relief which could be afforded to Clark, Hood & Company, against the defendant, would be incidental to that afforded them as against Mrs. Dozier, the mortgagor. But she is a complainant with them, and not a defendant against whom any relief is prayed.

"If the bill, as stated, should be taken as confessed against the defendant, it is evident that no proper decree granting relief could be entered. Under such circumstances, a demurrer should be sustained. Decree reversed, demurrer sustained, and bill dismissed."

Can it possibly be considered consistent with the amended bill in this cause to ask such a personal decree against appellant? Nowhere do they aver that they have been out one cent. Furthermore, they aver the contrary (see amendment to bill Tr., page 22), that this bank is a purchaser with full knowledge of all the fraud with which they aver the notes to be tained, and add the averment that they have a perfect defense to the notes.

This bill, therefore, taken as amended, does not only fail to allege anything which entitles them to the relief granted, but under the above quoted authority, positively placed a spanless gulf between them and the relief which they obtained in the court below, and which they endeavor to sustain in this court.

What if, as alleged in their brief, they did afterward pay off these notes—this, which they still aver in their

bill, to be worthless paper? They did not amend and afford defendants the information that they had decided it to be a valid obligation, or had been forced to pay these notes to their damage in certain sums, etc. This was their duty in order to put defendants on guard of the "bout-face," "back-to-face," turn things were taking behind the pleadings. Appellant could then have taken issue, if he chose, and could have shown what small damage had been sustained, if any, or perhaps that none had been.

We have examined the authorities and find the position of appellees in their brief on this proposition overwhelmed with authority to the contrary, and we cite 20 Cyc., page 130, from which we quote the following paragraph, viz.: "The general rule of damages in cases of fraud is that the party defrauded is entitled to recover the amount of the loss caused by the fraud of the other party, or, as it has been expressed, plaintiff is entitled to recover damages adequate to the injury which he has sustained. Plaintiff can recover the entire amount of his loss occasioned by the fraud, but the recovery must be limited to the actual loss, sustained by reason of the fraud. The expense incurred by plaintiff on account of the false representations may be the proper measure of damages to be recovered." (We direct the attention of the court to the copious citation of authorities thereunder.)

Jesse D. Jones, Flowers, Alexander & Brown, for appellees.

The first inquiry propounded in the letter by the clerk of the supreme court to counsel in this case, voicing the request of the supreme court, is: First, is the bill framed so as to support the decree for the payment of money by Lothrope to appellees? This question is answered by us in the affirmative. The original bill was filed in 1909. The decree of the chancery court was

rendered toward the close of 1911. When the bill was filed the suits in the circuit court instituted by the Bank of Newton were pending. Between the time when the chancery suit was instituted and the time when the final decree of the chancery court was rendered, many things happened, among which was the compulsory payment of appellees of the notes as shown in the final decree. Had the notes been paid when the bill was prepared, the bill would so have recited. And the fact that the notes were paid before the final decree authorized the chancellor to render the decree which should cover all matters consequent and germane to the allegations of the bill.

The bill, as framed, distinctly recited that Lothrope and Blythe were partners in the skin game; that within the scope of such partnership, Lothrope fraudulently deceived appellees into signing notes payable to bearer; that such notes, when due, were presented for payment and were protested; and that the supereme court had decided that the appellees were liable to the Newton Bank, innocent holder of the notes, and that unless the court of chancery should intervene, the appellees would be compelled to pay the judgment which would be rendered against them in the circuit court on the notes. The bill recites that Blythe and Lothrope should be compelled "to pay the said notes and to pay any judgment which might be rendered against these complainants." The bill further recited that the chancery court "can enter decree against those against whom liability should be enforced."

Accordingly, answering the question propounded by this appellate court as to whether the bill was framed so as to support the decree for Blythe and Lothrope to be adjudged liable to appellees, we say that the foregoing statement upholds our view; and, as shown on page 8 of the record, the original bill near its close, prays that Blythe and Lothrope be adjudged primarily liable to the

Bank of Newton on said notes, and if decree should be rendered against complainants in favor of the bank, then that complainants should have their decree against Blythe and Lothrope; and that proper decree be rendered as should appear to be necessary to the chancery court in order that justice might be done. In addition, the bill prayed for general relief.

That the chancery court will have jurisdiction to support the decree for the payment of money by Blythe and Lothrope to appellees under the above quotations from our bill is upheld by the following decisions: *Learned* v. *Holmes*, 49 Miss. 290; *R. R. Co.* v. *Brooks*, 66 Miss. 583; *Lumber Yard* v. *R. R. Co.*, 96 Miss. 116; *Craig* v. *Dougherty*, 61 Miss. 96; and see section 39 under heading of "Equity," Bobbs-Merril Digest.

Opposing counsel assert in their brief that the bill does not show that appellees were damaged by the fraud. We think the bill will easily show fraud and resulting damage. Lothrope is shown to have approached the complainant with a proposition which is distinctly shown not to have been made with good faith. The bill shows that the defendant partnership extended a supposedly valid contract, consideration for which was the execution of the notes; said contract limiting territory to the fortunate holder of the contract and two others; and that such contract was not carried through by defendants.

On the second proposition: If the bill is so framed, are appeellees entitled to recover of appellant, if at all, anything more than the money which they have been compelled to pay on the notes executed by them? Our answer to this is that the liability of Blythe and Lothrope extends, not only to the money which appellees have actually paid, but also to what they are in law under obligation to pay. In other words, if they are obligated (under the supreme court decision in the Newton Bank's suit) to pay to the bank the notes, then

the question whether they may have a portion or the whole is immaterial, since the original bill of complaint in this chancery suit prayed that Blythe and Lothrope should be bound and required to pay to the bank what the appellees should be required to pay. The answer to the honorable court's question, in our opinion, should be: The appellees are entitled to recover the money they have been compelled to pay and also what they have become bound to pay, whether appellees have actually paid the same or not; since the obligation to pay a future debt is an obligation just as certain as the actual present obligation to pay now or the obligation to pay a past-due debt. The court of chancery, in awarding full, adequate and complete relief, will not stand idly by and wait until appellees have actually had to pay, at some time in the future, the obligation on the notes to the bank, but will come at once to the relief of the appellees.

SMITH, C. J., delivered the opinion of the court.

Appellees filed their bill in the court below against C. S. Lothrope, J. E. Blythe, and the Bank of Newton, alleging that they had been induced by fraud to execute to C. S. Lothrope & Co., a partnership composed of C. S. Lothrope and J. E. Blythe, several promissory notes, which notes were afterwards purchased by the Bank of Newton; that this bank had instituted several suits thereon against appellees, which suits were then pending in the circuit court of Newton county; and by an amendment to the bill it was alleged "that the Bank of Newton had notice of the fraudulent character of the contracts of which the said notes were parts." The bill prayed that the bank of Newton be joined from prosecuting its suits at law on the notes, and that on final hearing—

"the Bank of Newton be required to deliver up to these complainants their said notes, and that the Bank of Newton be required to take its decrees against the said J. E.

Blythe, as well as against these complainants, and exhaust its remedy against the said Blythe before proceeding further against these complainants; that the said J. E. Blythe and the said C. S. Lothrope be adjudged and decreed to be primarily liable to the said Bank of Newton for the amount paid by the said bank for the said notes, and, if decree should be entered against these complainants in favor of said Bank of Newton, they have their decrees against the said J. E. Blythe and C. S. Lothrope, or either of them; that the said causes be taken up by this court and dealt with by this court and decree or decrees entered in such manner as to this court may seem necessary in order that justice may be done and that liability may be fixed upon the party or parties that should bear it. Complainants pray that, if they are mistaken in the relief herein asked for, they be granted such other further special or general relief as the case requires or as in equity they are entitled to. As in duty bound they will ever pray. Answer under oath is waived."

The decree entered on final hearing is not only not in accordance with the prayer of the bill, but is not supported by any of the allegations thereof. By it the bill was dismissed in so far as it sought relief against the Bank of Newton, and appellant was directed to pay to appellants the amounts of the various notes executed by them, together with interest thereon.

Appellant can only be called upon to make good to appellees the amount of any damage suffered by them by reason of the execution of these notes, conceding that their execution was induced by fraud. The bill contains no allegation that the notes have been paid either in whole or in part, or that appellees have been otherwise damaged by reason of the execution thereof, but, on the contrary, alleges that the notes have not been paid and that suits are now pending by which payment thereof is sought to be coerced. Under this decree, appellees may

collect from appellant the full amount of the notes though they themselves may never pay them.

It is true that it appears from the evidence that appellees have adjusted their differences with the Bank of Newton, but this fact did not warrant the court in entering the decree: First, because only such a decree can be entered as is supported by the allegations of the bill; and, second, because, while the evidence discloses an adjustment with the bank, it does not disclose how the adjustment was made or what amount, if any, appellees paid the bank pursuant thereto.

Reversed and remanded.

MONTGOMERY v. STATE.

[65 South. 572.]

1. CRIMINAL LAW. *Indictment and information. Sufficiency. Prison. Trustees. Violation of duty. Judicial notice. Delegation of authority. Ministerial duty.*

In an indictment or information the state must charge one offense and not many, and the defendant is only called upon to meet one charge, when the indictment contains but one count, and this charge must be definite and unambiguous.

2. PRISON. *Trustees. Violation of duty. Indictment. Sufficiency.*

Where an indictment charged accused with the violation of his duty as a member of the board of trustees of a penitentiary, first setting forth that it was the duty of the board of trustees to sell crops, receive the proceeds of such sale and pay them into the state treasury and further alleged that accused, though well knowing his duty, failed and refused to collect the proceeds of cotton seed sold to named persons, and to pay them into the treasury, and that the trustees, in nowise regarding their duty, did wilfully fail and refuse to sell such cotton seed, and that the board of trustees failed to receive the money for the sale of the cotton seed not sold. In such case the indictment was insufficient under Constitution 1890, section 26, which accords

to every person, charged with crime, the right to demand the nature and cause of the accusation, since it was uncertain whether the cotton seed had been sold and accused failed to collect the proceeds, or whether, after collection accused failed to pay the same into the treasury of the state, or whether the board of trustees refused to sell and collect the proceeds and pay them into the treasury.

3. CRIMINAL LAW. *Judicial notice. Code* 1906, *section* 3589.
Courts cannot take judicial notice that any other farm than the Parchmen farm, named by Code 1906, section 3589, as a part of the state penitentiary, is a part of such institution.

4. TRUSTEES. *Delegation of authority. Ministerial duty.*
The board of trustees of the state penitentiary cannot delegate to another the duty of selling the penitentiary products since that involves the exercise of discretion, but they may delegate to another the ministeral duty of indorsing checks and depositing them with the state treasury, and hence a member of the board of trustees is not guilty of official misconduct because the secretary of the board embezzled funds which he was authorized to deposit or without authority, sold products of the penitentiary and converted the proceeds.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

W. A. Montgomery was convicted of misconduct in the discharge of his duty as a penitentiary trustee, and appeals.

The facts are fully stated in the opinion of the court.

R. N. Miller, E. F. Noel, and *W. J. Croon,* for appellant.

Geo. H. Ethridge and *Powell & Thompson,* for appellee.

COOK, J., delivered the opinion of the court.

Appellant is a member of the board of trustees of the penitentiary, and as such was indicted and convicted of misconduct in the discharge of his official duties. The trial court fined appellant one hundred dollars and re-

moved him from office. From this judgment appellant prosecutes this appeal.

Omitting the formal part, the indictment is in these words, viz.:

"Whereupon it became and was their duty, as such trustees of the board of trustees of the state penitentiary during the years 1911, 1912, and 1913, to sell all crops and to receive all moneys from the sale of manufactured goods, crops, and other properties belonging to the penitentiary of the state of Mississippi and to immediately pay the same into the state treasury, and especially to sell certain cotton seed raised on the Sunflower State Farm and to collect and receive from the Natchez Cotton Oil Company of Natchez, Mississippi, to whom said cotton seed had been sold, the sum of five thousand four hundred and ninety-six dollars and thirty-nine cents from the sale of cotton seed in cars Nos. S. P. 81546, I. C. 140776, Southern 107826, I. C. 13755, Southern 138130, New York Central 10611, C. of Ga. 4436, and from the Jackson Oil & Refining Company of Jaskson, Mississippi, the sum of three thousand one hundred and eighty-four dollars and forty-four cents from the sale of cotton seed in cars Nos. G. R. I. 3529, I. & G. N. 5354, M. L. 8284, and A. C. L. 30981; nevertheless the said C. C. Smith, Leroy Taylor, and W. A. Montgomery, at the time and place aforesaid, well knowing their duty in this behalf, but in nowise regarding it, did wantonly, willfully, knowingly, and unlawfully fail, neglect, and refuse during the two years prior to the date of this indictment to sell the cotton seed in the said cars Nos. S. P. 81546, I. C. 140776, Southern 107826, I. C. 13755, Southern 138130, N. Y. C. 10611, C. of Ga. 4436, G. R. & I. 3529, J. & G. N. 5354, M. L. 8284, and A. C. L. 30981, and receive the sum of eight thousand six hundred and eighty dollars and eighty-three cents from the sale of the same, and immediately pay the same into the state treasury of the state of Mississippi, as aforesaid, as they

were in duty bound to do, and thence continually, until the finding of this indictment, have so as aforesaid failed, neglected, and refused to receive the proceeds of said cotton seed and immediately pay the same into the state treasury of the state of Mississippi."

To this indictment appellant demurred, assigning the following grounds:

"(1) The indictment charges no offense known to the law of the state of Mississippi, and no offense at common law.

"(2) The indictment charges or attempts to charge several offenses distinct and independent in the same count in the same indictment and is duplicitous and void.

"(3) The indictment does not inform the accused of the nature and cause of the accusation against him.

"(3½) Because of the fact that the date and authority by which the cotton seed was sold to the oil company is not set out; it does not appear from the indictment the cotton seed belonged to the state.

"(4) The indictment charges in one sentence that defendant refused to sell the cotton seed, and then charges him with a failure to receive the money for it, and then charges him with failing to pay the money into the treasury which is contradictory in terms and is vague, uncertain, and indefinite, and the defendant ought not to be held to answer the same.

"(5) Because the legal duty attempted to be charged is not set out; it does not appear from the indictment that the claim for the cotton seed was not barred by limitation and could be collected.

"(6) Because the duty to sell and receive the money is a discretionary duty, not indictable unless corruptly done.

"(7) Because the indictment does not charge corrupt failure of duty."

This demurrer was overruled by the court.

The first averment of the indictment sets out the duties of the board of trustees of the penitentiary with refer-

ence to the sale of crops, receipt of proceeds of such sales, and the payment of same into the state treasury. The charging clause of the indictment says that it was the duty of the board of trustees of the penitentiary to sell all crops and to receive all money from the sale of crops and to immediately pay the same into the state treasury; then follows the specific charge that it was the duty of the board of trustees "to sell certain cotton seed raised on the Sunflower State Farm and to collect and receive from the Natchez Cotton Oil Company and from the Jackson Oil & Refining Company of Jackson, Mississippi, to whom said cotton seed had been sold," the sums of money mentioned in the indictment. The indictment then proceeds to charge that the trustees, "well knowing their duty in this behalf, but in nowise regarding it, did wantonly, willfully, knowingly, and unlawfully fail, neglect, and refuse, during the two years prior to the date of this indictment, to sell the cotton seed in the said cars." Again, following a description of the cars, the indictment charges that the board of trustees failed to receive the money for the sale of the cotton seed not sold. It will be observed from this that the indictment charges that certain described property had been sold, followed by a charge that the board of trustees had wantonly failed and refused to sell the same. Immediately succeeding the charge that the property had not been sold, the indictment charges the board of trustees with neglecting and rufusing to receive the purchase money for the cotton seed not sold.

Section 26 of the state Constitution accords to every person charged with crime the right "to demand the nature and cause of the accusation."

It is decidely uncertain whether the averments of the indictment charge that the cotton seed mentioned was actually sold by the trustees, and that the trustees failed and refused to collect the purchase price and pay the same into the state treasury, or that the board of trus-

tees refused to sell the cotton seed at all, and, neglecting their duty in this respect, they had thereby neglected to collect the proceeds of the sale and pay same into the treasury.

If we take the first charge, it would appear that the cotton seed was sold and the trustee neglected and refused to collect and cover the purchase money into the treasury.

If we take the second charge, it would appear that the cotton seed had never been sold, and the state meant to charge its officers with wantonly failing to perform their duty to sell. Ordinarily the sale of a thing embraces several elements—an agreement on the price, the delivery of the article sold, and the collection of the agreed price. So it may be said that the last averment of the indictment charges a willful and wanton failure and refusal to sell the cotton seed by reciting that the trustees failed to do any and all of those things necessary to complete a sale.

But the first averment, read in connection with the last averment, destroys this idea by saying that the cotton seed had been sold, at a price agreed on, but the money had not been collected. The first averment may mean that the board of trustees and the Oil Mills had agreed on a price for the cotton seed, and the cotton seed had been delivered to the purchasers, but the trustees had neglected to collect the money and pay same into the treasury, while the last averment flatly contradicts this averment by saying that the cotton seed was not sold at all, and besides, the value of same had not been collected by the trustees and, furthermore, had not been paid into the treasury by the trustees.

It will be noted that the indictment is in one count, and the first averment is in direct conflict with the second averment, and the person accused, by the overruling of his demurrer, has been denied his constitutional right "to demand the nature and cause of the accusation."

To the charge that they had refused and neglected to sell the cotton seed, it is conceivable that the trustees might say they made every effort to sell and could not find a purchaser. To the charge that they had sold the cotton seed but had not collected the purchase money, the trustees might be able to say and prove that they had agreed upon the price, loaded the seed into the cars, but the purchasers refused to pay for same, and for this reason the money has not been turned into the treasury, and they still had the cotton seed but had been unable to find a buyer.

It appears to be clear that the separate, distinct, and contradictory averments in the indictment left it uncertain what the state expected to prove, and for this reason it was impossible for the defendant to prepare his defense, if any he had, to the charge attempted to be preferred against him.

The state must charge one offense and not many. The defendant is only called on to meet one charge when the indictment contains but one count, and this charge must be definite and unambiguous.

Before leaving this branch of the case it will be noted that the indictment charges that it was especially the duty of the board of trustees "to sell certain cotton seed raised on the Sunflower State Farm." It is not alleged that the "Sunflower State Farm" is a part of the penitentiary. We cannot take judicial notice that a farm of this name is a part of the penitentiary and under the supervision of the board of trustees, but this must be averred and proven.

Section 3589 of the Code 1906 names one farm as part of the penitentiary, viz., "Parchman," and, had the indictment averred that the cotton seed was raised on that farm, it would have been sufficient without further averment.

Coming now to the evidence in support of the charges in the indictment, it is only necessary to say that the

secretary of the board of trustees, testifying for the state, said that appellant authorized him to make sales of cotton seed, and that he sold the cotton seed in question, collected the money, and converted a part of same to his own use.

Appellant testified that he never authorized the secretary to sell cotton seed, and thus arises a sharp conflict in the evidence upon that point.

At the instance of the state the trial court instructed the jury as follows:

"The court instructs the jury for the state that it is the duty of the trustees of the state penitentiary to sell the cotton seed raised on the state farms themselves, and to receive the money for the same themselves, and to pay the same immediately into the state treasury themselves, and they cannot delegate these duties to any other person without violating the law, and if the jury believe from the evidence in this case beyond all reasonable doubt that Col. W. A. Montgomery, acting with the other members of the board of trustees, did authorize Lawrence Yerger, the clerk of said board, either to sell the seed in question for them or to receive the proceeds of such sale for them or to pay the same into the state treasury for them and did not themselves sell the seed and did not themselves receive the money for the same and did not themselves immediately pay the same into the state treasury, then it is the sworn duty of the jury to return the following verdict: 'We, the jury, find the defendant, W. A. Montgomery, guilty as charged in the indictment.' "

This instruction required the jury to convict appellant, although they might believe from the evidence that appellant did not authorize Yerger to sell the seed. The jury were authorized to find that appellant did not authorize Yerger to sell the seed, because appellant testified that he did not do so. If Yerger sold the seed without authority, appellant is not responsible for his embez-

zlement of any portion of the proceeds of the sale. According to appellant's evidence, Yerger sold the seed without his knowledge or consent, and appellant did not know that Yerger had collected the money, and there is no claim or pretense that appellant knew that Yerger had sold the seed in question, or that he had converted the money to his own use.

The whole theory of the state is based on Yerger's evidence and an order entered upon the minutes of the board of trustees authorizing the secretary to indorse checks and deposit same in the depositories. The duty imposed on the board to sell the products of the penitentiary required the exercise of discretion or *quasi*-judicial functions and could not be delegated to others, but we think the ministerial or mechanical act of indorsing checks and depositing same could be delegated to the secretary. 23 Am. & Eng. Ency. of Law, 376; 29 Cyc. 1395.

Under the facts of this case, the very foundation of the state's case rested and depended upon whether Montgomery authorized Yerger to make this sale. If Montgomery did not authorize the sale, Yerger received the money unlawfully and without any fault of Montgomery, and Montgomery cannot be criminally liable for Yerger's independent embezzlement of funds which came into his hands without the knowledge or fault of Montgomery.

It may be that the authority to indorse checks afforded the opportunity and means whereby Yerger was enabled to embezzle the money, but it must be borne in mind that, if he sold the cotton without authority from Montgomery, Montgomery, could not be held criminally responsible for Yerger's stealing the cotton, nor can he be held liable for Yerger's embezzling the money which he secured by an unlawful and unauthorized sale of the cotton. The instruction ignored this feature of the case, when it required the jury to convict Montgomery if

Montgomery himself did put the money in the treasury, although they might believe that Montgomery never in fact authorized Yerger, the secretary, to sell the seed in question, and that he (Montgomery) did not know Yerger had sold the seed and collected the purchase price. There is a clear distinction between criminality and negligence, and, though it be conceded that Montgomery was grossly negligent in not keeping himself posted upon the doings of the secretary, it by no means follows that he can be convicted for failing to immediately pay the money into the treasury because he did not know that Yerger had sold the seed and converted the money. He is liable in a civil suit for the conversion of the money by his agent, but he cannot be convicted for failing to pay into the treasury the money stolen by the agent, because this was manifestly beyond his power to do.

It seems to be the theory of the state that the trustees here committed a crime when it is proven that some one other than themselves manually delivered funds to the treasurer of the state; that they must deliver the money themselves to the treasurer, and, failing to do so, they subject themselves to prosecution. We are unable to indorse this theory because this would secrifice the spirit to the letter of the law.

Ministerial or mechanical powers or duties may be delegated, and, this being true, it logically follows that no crime is committed when such powers or duties are delegated, although the delegated person departs from his duty and commits an independent crime.

The demurrer to the indictment is sustained, the judgment of the circuit court is reversed, and defendant discharged.

Reversed.

AMERICAN EXPRESS CO. *v.* BEER.

[65 South. 575.]

1. STATUTES. *Construction. Validity. Commerce. Regulations. Powers of states. Shipment of liquors. Application of statutes. Power of congress.*

It is always the court's duty in passing upon the constitutionality of a statute to separate the valid from the invalid parts thereof, if this can be done, and to permit the valid parts to stand unless the different parts of the statute are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole and that if all could not be carried into effect it would not have enacted the residue independently.

2. COMMERCE. *Regulation. Power of state. Shipment of liquors. Validity and application of statutes.*

Laws 1914, chapter 127, sections 2-7 and 11, paragraph 2, known as the May-Mott-Lewis Act making it unlawful for any person to order and have shipped to him, or for him to receive from without the state intoxicating liquors in excess of one gallon, does impose a direct burden on interstate commerce, but is authorized by the Webb-Kenyon Act. (Act March 1, 1913, chapter 90, 37 Stat. 699) divesting intoxicating liquors of its interstate character, when it is intended by any person interested therein to be received in violation of the laws of the state into which it is shipped, even as applied to liquor being shipped for personal use of the consignee and his family and not to be sold or used unlawfully.

3. COMMERCE. *Regulations. Shipment of liquors. Validity of statute.*

The provisions in Laws 1914, chapter 127, section 5, known as the May-Mott-Laws Act, that those transporting liquors into the state shall keep a record of the same and file statements thereof with the clerk of the circuit court, is not invalid as imposing a direct burden on interstate commerce, regardless of whether or not it is within the Webb-Kenyon Act (Act March 1, 1913, chapter 90, 37 Stat. 699) which prohibits the transportation of liquor from one state into another for sale in violation of any law of the state where received.

4. COMMERCE. *Regulations. Power of congress. Shipment of liquors. Validity of statute.*

The power of congress to prescribe what commodities shall be legitimate subjects of interstate commerce is undoubted, and the Webb-Kenyon Act (March 1, 1913, chapter 90, 37 Stat. 699) is a proper exercise of such power.

5. COMMERCE. *Commerce clause. Operation.*

The commerce clause of the Federal Constitution excludes state regulation and control only over interstate commerce in articles that are legitimate subjects of trade and, in the absence of congressional legislation declares what are and what are not legitimate subjects of trade.

APPEAL from the chancery court of Warren county.

HON. E. N. THOMAS, Chancellor.

Bill by M. D. Beer against the American Express Company. From a decree overruling a demurrer to the complaint, defendant appeals.

Sections 5 and 7 of the act of the Mississippi legislature of 1914 known as House Bill No. 5, are as follows:

Sec. 5. That it shall be the duty of any railroad company, express company, or any other common carrier, or person, firm or corporation who shall carry any intoxicating liquors into this state or from one point to another within this state, for the purpose of delivery, and who shall deliver such intoxicating liquor to any person, company or corporation, to keep a record of such liquor and file with the clerk of the circuit court of the county in which such liquor is delivered, . . . the name and post-office address of the consignor and consignee, the place of delivery, and to whom delivered, and the kind and amount of intoxicating liquor delivered, such statements to be filed within three days after the date of delivery of such liquor.

Sec. 7. That it shall be unlawful for any railroad company, express company, corporation or other common carrier or the agent of any railroad company, express company, corporation or other common carrier, to deliver any intoxicating liquor other than to the consignee;

provided in any case where the consignee is unable, on account of sickness of himself or family, to appear in person and sign for such liquor, he may, by written authority, authorize some reputable person to sign and receive same for him; and in no case where there is reasonable ground for believing that any consignment or package contains intoxicating liquors, shall any railroad company, express company, corporation or other common carrier, or the agent of such railroad company, express company, corporation or common carrier, or person, deliver such consignment or package, without having such consignee or his lawful agent aforesaid sign and deliver to the person in whose charge such consignment or package may be for delivery, a written statement in substance as follows:

"I hereby certify that my name is ————; that my post office is ———— Mississippi; that I am more than twenty-one years of age; that I am the consignee to whom the package containing ———— of intoxicating liquors was consigned at ————, on the ———— day of ————, 19—, to be used for (set out the use for which they are to be used). I will not use this liquor in violation of any law of this state.

"Signed and dated at ————, Mississippi, this ———— day of ————, 19—.

"————, Consignee,

"By ————, Agent of Consignee."

And in no case shall any railroad company, express company, corporation or common carrier, or person or agent of such railroad company, express company, corporation or other common carrier or person, be liable for damages for not delivering such intoxicating liquor or package supposed to contain the same until such statement is executed and delivered, as herein provided. And in no case shall any such railroad company, express company, corporation, or other common carrier, person, or the agent of any such railroad company, express com-

pany, corporation or other common carrier or person, be held liable or subject to the penalties prescribed in this act for delivering such intoxicating liquors or package to the consignee without requiring such statement when such statement is executed and delivered as herein provided, unless the party taking such statement knows the same to be false, in which case he may refuse to deliver such intoxicating liquors or package.

STATEMENT OF FACTS.

The bill filed in the court below alleged in substance, that appellee is lawfully engaged in the wholesale liquor business in the state of Louisiana, having numerous customers living at various points in the state of Mississippi; that appellant is a common carrier engaged in the business of transporting and delivering property from points without the state of Mississippi to points in the state, as well as from and to points wholly within the state; that shipments of liquor from appellee to customers in Mississippi originate in the state of Louisiana, and in the course of transportation are delivered by the initial carrier to appellant for transportation and delivery to the consignees in Mississippi. The bill further alleged that:

"The complainant on the 4th day of April, 1914, having received at his place of business at Delta, Louisiana, an order from W. J. Fletcher, who is over the age of twenty-one and purchaser in good faith who lives at Redwood, Mississippi, for one case of ——— whisky, containing twelve quarts, *i. e.*, three galons, to be shipped him at the said Redwood, Mississippi, said Redwood station being along the Yazoo & Mississippi Valley Railroad and a place where defendant has an office, whereupon the complainant acknowledging, responding, conforming to, and accepting said orders in good faith shipped through the Vicksburg & Delta Ferry Company, a common carrier engaged in interstate commerce between the state

of Louisiana and Mississippi, said case of whisky so ordered which was delivered to and accepted by the said ferry company in a continuous transportation of interstate commerce to be delivered to W. J. Fletcher at Redwood, Mississippi, through said defendant express company at Vicksburg, Mississippi, and that on April 6, 1914, within its usual office hours and according to its rules and regulations, said liquor was tendered the said defendant express company to be transported and delivered to the said consignee at Redwood, Mississippi, as aforesaid. That the defendant company through its agents refused to accept the said package of liquor for transportation and delivery as aforesaid, and gave as a reason for said refusal that it was prohibited from transporting liquor in one shipment when same amounted to more than one gallon and for the further reason that, if accepted and carried, said defendant could not make a delivery of said shipment to the consignee, as it was prohibited from carrying and delivering liquor in shipments of over one gallon by the laws of the state of Mississippi, under that certain act known as 'House Bill No. 5,' and which was approved March 6, 1914, although said shipment and package of liquor was known to the said defendant to be a subject of interstate commerce, and in continuous course of transportation at the time the liquor was tendered to the said defendant, from Delta, Louisiana, to Redwood, Mississippi. That the said defendant agreed to accept the said liquor provided your complainant would make three separate packages of not over one gallon each and thereby make three separate and distinct shipments to the said consignee, but that it could not make delivery even of the three packages unless the consignee would sign and execute as a condition precedent to the delivery a certain receipt as designated and provided for in the said 'House Bill No. 5' of Laws 1914. That the said defendant then and there notified and advised the complainant and the ferry company that it

would not thereafter receive, transport, or deliver any package containing malt, vinous, or spiritous liquor contained in packages of more than one gallon in one shipment, and that even if transported could not deliver a shipment of one gallon or less without requiring the consignee as a condition precedent to sign a receipt or written statement as provided for by the said act, 'House Bill No. 5' approved March 6, 1914, without regard to the fact that said shipment hereafter tendered or intended to be tendered to the said defendant was a subject of interstate commerce in due course of continuous transportation thereof or not. . . . That the consignee, W. J. Fletcher, to whom the case of whisky (so tendered to the defendant company), was sold, is one of your complainant's regular patrons, invariably purchasing in case lots. That said consignee is engaged in farming, and your complainant is informed and believes and states the fact to be that W. J. Fletcher is a man of high character and reputation, and he uses the liquor heretofore shipped for his own home consumption, and that the case of liquor so purchased by him from this complainant and refused by the defendant company was intended by said purchaser to be used, as complainant is informed and believes, and so states the fact to be, for his own home and members of his family and is not intended to be used by the said consignee, W. J. Fletcher, in violation of any law of the state of Mississippi, and of this fact your complainant so advised the said defendant express company, but notwithstanding same said defendant wholly refused to accept the said liquor for transportation and delivery as aforesaid."

The bill further alleged that:

"The sole reason why the defendant refused to receive the said case of whisky, and the sole reason why it will hereafter refuse to receive, carry, or deliver any liquor tendered by this complainant or the ferry company in due course of interstate trade and interstate

commerce is based upon the idea that defendant is bound to obey the provision and limitation of one gallon and the provision for delivery as provided by the law of 1914, as aforesaid or if it did, to suffer the penalties imposed and prescribed thereunder. . . . Your complainant will further show that the said defendant express company while engaged in interstate business as a common carrier for hire is not required to abide by, obey, nor to comply with the several provisions and sections of House Bill 5, Laws of 1914, approved March 6, 1914, aforesaid, and says that in so far as any provision in the act interferes with interstate commerce it is absolutely void and of no force."

The bill then alleged that section 1, 2, 4, 5, 6, 7, 8, subsections 1, 2, 3, and 4, of section 11, sections 12, 13, 14, 16, 18, of House Bill No. 5, of the Laws of 1914, approved March 6, 1914, are void, because they transgress various provisions of the Federal Constitution.

The prayer of the bill was that:

Appellant be enjoined from "refusing to accept, transport, and deliver along its said lines packages containing vinous, spirituous, alcoholic, malt, or other liquors which are subjects of interstate commerce of the general nature of those herein described which may be transported in continuous passage by complainant from the state of Louisiana to the city of Vicksburg, Mississippi, for continuous transportation in interstate commerce to places in the state of Mississippi reached by its said lines and where it has an office and agency, and that defendant be enjoined to accept such liquors when subjects of interstate commerce, and transport and deliver same upon complainant tendering such packages of liquors at its place of business in Vicksburg, Mississippi, for continuous shipment at reasonable hours and in accordance with such general rules and regulations as the defendant may from time to time have in force at Vicksburg, Mississippi, and other places on its line, with regard to the reception

and transportation and delivery of such subjects of commerce as it is customary to handle and without requiring a statement as provided in said act, but be handled under the laws enacted by the Congress of the United States of America, and to accept, transport and deliver to *bona fide* consignees over the age of twenty-one years, such subjects of interstate commerce as above described to points where it is doing business and has an office and agency and to transport the case of whisky, and said defendant be enjoined from filing with the circuit clerk the statement as required by sections 5 and 6 of said House Bill No. 5, and that it be enjoined from refusing to deliver said shipment, and also without requiring the consignee to sign a statement as provided by said Acts, 1914, to the town of Redwood, Mississippi, and that on final hearing said injunction be made perpetual, and that the defendant be made to accept, transport, and deliver at all times liquor shipments in accordance with the Constitution, laws, and statutes of the United States and the reasonable rules of the said defendant."

This bill was demurred to by appellant, the demurrer overruled, and, upon appellant's declining to plead further, a final decree was entered in accordance with the prayer of the bill.

H. D. Minor, Chas. N. Burch, Hirsh, Dent & Landau, McLaurin & Armistead and *Mayes & Mayes,* for appellant.

Henry & Canizaro, for appellee.

SMITH, J., delivered the opinion of the court.

(After stating the facts as above). While the constitutionality of practically all of the sections of the May-Mott-Lewis Act is called in question by counsel for appellee, we will take into consideration only the objections raised to sections 2, 5, 7, and paragraph 2 of section 11, and will leave the residue of the act altogether out of

view, for the reason that, if these sections are valid, whether the remaining sections are valid or not does not concern the parties hereto. It is always the court's duty in passing upon the constitutionality of a statute to separate the valid from the invalid parts thereof, if this can be done, and to permit the valid parts to stand unless the different parts of the statute are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole and that if all could not be carried into effect it would not have enacted the residue independently. *Adams* v. *Standard Oil Co. of Kentucky,* 97 Miss. 879, 53 So. 692. We are relieved in the case at bar from any doubt as to whether the legislature would have enacted the sections of the statute here in question independently of the residue thereof, for the reason that it is expressly provided by section 18 of the act that:

"If, for any reason, any section or part of this act shall be held to be unconstitutional or invalid, then that fact shall not invalidate any other part of this act, but the same shall be enforced without reference to the part so held to be invalid."

The objections of counsel for appellant to the sections of the May-Mott-Lewis Act, to which we have indicated that we will address our attention, may be reduced in substance to three: First, the requirements and prohibitions therein contained impose a direct burden on interstate commerce; second, that the federal statute known as the Webb-Kenyon Act has no application for the reason that it appears that the liquor was not to be sold or used in violation of any law of the state; third, the Webb-Kenyon Act is void under the commerce clause of the Federal Constitution. Const. art. 1, sec. 8, subd. 3.

The first objection in so far as sections 2, 7, and 11 are concerned is well taken, for there can be no question but that the prohibitions and requirements contained in these three sections impose a direct burden on interstate

commerce in intoxicating liquors, and consequently are void unless within the provisions of the Webb-Kenyon Act. This act and its title are as follows:

"An act divesting intoxicating liquors of their interstate character in certain cases.

"Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever," of any "intoxicating liquor of any kind, from one state . . . into any other state, . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package, or otherwise, in violation of any laws of such state, . . . is hereby prohibited."

Section No. 2 of the May-Mott-Lewis Act, following closely the provisions of the Webb-Kenyon Act, which the draftsman of these sections evidently had before him at the time they were drawn, provides:

"That it shall be unlawful for any person, firm or corporation, or any officer, agent or employee thereof, to ship or transport in any manner, or by any means whatever, any intoxicating liquor of any kind from a point within any other state, territory or district of the United States, or place subject to the jurisdiction thereof, to any person, firm or corporation, or any agent, officer or employee thereof, in this state, which said intoxicating liquor is intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of this state now in force or hereafter to be enacted."

By paragraph 2 of section 11 of this act it is made lawful for—

"any person to order and have shipped and delivered to him, from without the state, for his own use or for social use in his home or for the use of the members of his family residing with him, such intoxicating liquors in quantities not exceeding one gallon, or malt liquor not exceeding one keg or cask of beer."

The result of these two sections of the act is that it is unlawful for any person to order and have shipped and delivered to him, or for him to receive, from without the state, intoxicating liquors in quantities in excess of one gallon. He has no right under the statute to receive intoxicating liquors shipped to him from a point without the state in quantities in excess of one gallon and should he do so such liquor would be received by him in violation of the laws of the state. Such a shipment of liquor therefore is clearly within the terms of the Webb-Kenyon Act as a mere inspection thereof will demonstrate, for it expressly devests intoxicating liquor of its interstate character when it is intended by any person interested therein to be received in violation of the laws of the state into which it is being transported.

But it is said, in substance, by counsel for appellee—and they are supported in so doing by the cases of *Adams Express Co.* v. *Commonwealth,* 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342, and *Palmer* v. *Southern Express Co* .(Tenn.), 165 S. W. 236—that the Webb-Kenyon Act has no reference to the quantity of liquor which a person interested therein may receive, or to the manner in which he may receive it, or with what he must do in order to be entitled to receive it; that the act applies only to intoxicating liquor intended by some person interested therein to be possessed, sold, or used in violation of law; that, quoting from their brief:

"It is enough for the disposition of this case to say, that it does not appear that the liquors shipped were intended to be sold or used in violation of any law of the state, and, therefore, the Webb-Kenyon Act does not apply to this controversy. From the facts stated and confessed by the demurrer, the liquors purchased were for personal use of W. J. Fletcher and his family; this was a lawful use, and indeed permitted by the statute in question."

The language of this act is plain and unambiguous, and it is therefore unnecessary to invoke any rules of con-

struction in order to ascertain its meaning. We will, however, examine it in the light of some of the leading cases decided by the supreme court of the United States in dealing with the right of a state to regulate commerce in intoxicating liquor shipped into the state from without.

This matter seems first to have been squarely presented to the court in 1847 in the License Cases, 5 How. 505, 12 L. Ed. 256. In those cases "the question was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire relating to the sale of spirituous liquors were repugnant to the Constitution of the United States by reason of an alleged conflict between them and the power of Congress to regulate commerce with foreign countries and among the several states." The validity of the statutes was upheld, and all of the justices composing the court concurred in the result, but they each delivered separate opinions, except Mr. Justice NELSON, who concurred in the opinions delivered by Chief Justice and Mr. Justice CATRON. In 1887, in the case of *Bowman* v. *Chicago & N. W. Railroad Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, the court stated that:

"From a review of all of the opinions (referring to the opinions in the License Cases) the following conclusions are to be deduced as the result of the judgments in those cases: All the justices concurred in the proposition that the statutes in question were not made void by the mere existence of the power to regulate commerce with foreign nations and among the states delegated to Congress by the Constitution. They all concurred in the proposition that there was no legislation by Congress in pursuance of that power with which these statutes were in conflict. Some, including the Chief Justice, held that the matter of the importation and sale of articles of commerce was subject to the exclusive regulation of Congress whenever it chose to exert its power, and that

any statute of the state on the same subject in conflict with such positive provisions of law enacted by Congress would be void. Others maintained the view that the power of Congress to regulate commerce did not extend to or include the subject of the sale of such articles of commerce after they had been introduced into a state, but that when the act of importation ended, by a delivery to the consignee, the exclusive power over the subject belonged to the states as a part of their police power."

In *Bowman* v. *Chicago, etc., supra,* the court had under consideration a statute of the state of Iowa forbidding any common carrier to bring into the state any intoxicating liquor from any other state or territory without having a certain certificate therein required, and, though this statute was not in conflict with any regulation of interstate commerce adopted by Congress, the court held the act void for the reason that nonaction on the part of Congress "with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in the commodity or by that means of transportation shall be free." In the course of its opinion the court said:

"The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its nonaction in such cases with respect to any particular commodity or

mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation, shall be free. . . .

"It is conceded, as we have already shown, that for the purposes of its policy, a state has legislative control, exclusive of Congress, within its territory, of all persons, things and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measurers tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, expressed or implied, regulate commerce between its people and those of other states of the Union in order to effect its end, however desirable such a regulation might be."

In this case the court in effect declined to follow the view concurred in by all of the justices in the License Cases, that state regulations of commerce in intoxicating liquor brought into the state from without, and while it retains its interstate character, are "not made void by the mere existence of the power to regulate commerce with foreign nations and among the states delegated to Congress by the Constitution," and for the first time clearly announced that the failure of Congress to legislate with respect thereto is a declaration of its purpose that commerce therein shall be free.

In 1890, the case of *Leisy* v. *Hardin,* 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, the court held that the right under the Constitution of a citizen of one state to import intoxicating liquor into another state carries with it the right to sell it there in the package in which it

was imported. In the course of its opinion the court also stated that:

"The authority of *Pierce* v. *New Hampshire* (one of the License Cases hereinbefore referred to), in so far as it rests on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to."

Following these decisions Congress passed the law known as the Wilson Bill, which provided that:

"All fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Act Aug 8, 1890, ch. 728, 26 Stat. 313 (U. S. Comp. St. 1901, p. 3177).

This statute was evidently passed as a result of the decision of *Bowman* v. *Chicago,* and *Leisy* v. *Hardin, supra,* and for the purpose of giving to the states the right it was at one time supposed they had, in the absence of congressional action, to regulate commerce in intoxicating liquors when brought into the state from without.

In *Rhodes* v. *State of Iowa,* 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, the court held that the words "upon arrival in such state or territory," in the act, meant "arrival at the point of destination and delivery there to the consignee," so that the only effect of the act was to permit the states to regulate commerce in intoxicating liquors brought into the state from without after de-

livery of the liquor to the consignee, and while it yet remains in the package in which it was transported. In the course of its opinion the court pointed out that:

"It is clearly contemplated that the word 'arrival' signified that the goods should actually come into the state since it is provided that 'all fermented, distilled and other intoxicating liquors or liquids transported into a state or territory,' and this is further accentuated by the other provision 'or remaining therein for use, consummation, sale or storage therein.' "

And, continuing, the court said:

"This language makes it impossible in reason to hold that the law intended that the word 'arrival' should mean at the state line, since it presupposes the coming of the goods into the state for 'use, consumption, sale, or storage.' The fair inference from the enumeration of these conditions, which are all-embracing, is that the time when they could arise was made the test by which to determine the period when the operation of the state law should attach to goods brought into the state. But to uphold the meaning of the word 'arrival,' which is necessary to support the state law, as construed below, forces the conclusion that the act of Congress in question authorized the state laws to forbid the bringing into the state at all. This follows from the fact that if 'arrival' means crossing the line, then the act of crossing into the state would be a violation of the state law, and hence necessarily the operation of the law is to forbid crossing the line and to compel remaining beyond the same. . . . Undoubtedly the purpose of the act was to enable the law of the several states to control the character of the merchandise therein enumerated at an earlier date than would have otherwise been the case, but it is equally unquestionable that the act of Congress manifests no purpose to confer upon the states the power to give their statutes an extraterritorial operation so as to subject persons and property beyond their borders to the

restraints of their laws. . . . If it had been the intention of the act of Congress to provide for the stoppage at the state line of every interstate commerce contract relating to the merchandise enumerated in the act, such purpose would have been easy of expression. The fact that such power was not conveyed, and that, on the contrary, the language of the statute relates to the receipt of the goods 'into any state or territory for use, consumption, sale, or storage therein,' negatives the correctness of the interpretation holding that the receipt into any state or territory for the purposes named could never take place."

The next statute of this character enacted by Congress was the one here under consideration, the Webb-Kenyon Act, and a comparison of its language with that of the Wilson Act will demonstrate that its draftsman intended to cure the defect in the Wilson Act and to make it unlawful to transport into a state from without intoxicating liquors intended by any person interested therein to be dealt with contrary to the laws of the state; in other words, to devest such intoxicating liquor altogether of its interstate character, and thereby permit the laws of the state into which it was being transported to operate upon it immediately upon its crossing the state line—from which it follows that the state may prescribe not only the use to which liquor is to be put, but the quantity that, and the manner in which it, may be received.

As was said by the supreme court of Kentucky in the case of *Adams Express Co.* v. *Commonwealth,* 154 Ky. 462, 157 S. W. 908:

"The history of the Webb-Kenyon law, the causes that led to its enactment, and the evils it was intended to remedy, taken in connection with the carefully chosen words of the act, show that the object was to aid the states in suppressing the illegal traffic in intoxicating liquors that they had been much hindered in doing by the

protection afforded violators of the law by the commerce clause of the Federal Constitution."

This manifest purpose for which the act was passed will fail of accomplishment if it applies only when the liquor which is being transported is intended by some person interested therein to be sold or used unlawfully, for the reason that it would be practically impossible in most cases to prove such an intent except by proving that it was, after being received, in fact sold, or used unlawfully. To give only such effect to the act as is here contended for by counsel for appellee would result in its being amended by judicial construction. As enacted by Congress, it reads as follows:

"Which intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used . . . in violation of the laws of such state," etc.

If construed as counsel contend it should be, it would in effect be amended either by striking out the word "received," or by interpolating between the words "received" and "possessed" the words "for the purpose of being," so that the act would then read:

"Which intoxicating liquor is intended by any person interested therein to be possessed, sold, or in any manner used in violation of any laws of such state," etc.

Or:

"Which intoxicating liquor is intended by any person interested therein to be received for the purpose of being possessed, sold, or in any manner used . . . in violation of any laws of such state," etc.

To so amend the act is the province of Congress and not of the courts.

The purchaser and consignee of the particular shipment here in question is, of course, one of the persons interested therein, and, since it exceeded one gallon in quantity, he manifesly intended to receive it in violation of law. Therefore, under the Webb-Kenyon Act sup-

plemented by the May-Mott-Lewis Act, it was unlawful for appellant to transport it.

The construction placed upon the Webb-Kenyon Act in *Atkinson* v. *Southern Express Co.*, 94 S. C. 444, 78 S. E. 516, 48 L. R. A. (N. S.) 349, though probably not necessarily involved in the decision, seems to be in accordance with the views herein expressed.

With reference to the requirements of section 7 of our state statute here under consideration, it will be sufficient to say that they are only such as must be complied with by the consignee before it becomes lawful for him to receive the liquor, and therefore clearly within the provisions of the Webb-Kenyon Act.

It may be that the requirement of section 5 is not within the provisions of the Webb-Kenyon Act, for the reason that it applies to all shipments of intoxicating liquor whether made in violation of law or not, as to which we will express no opinion, for the reason we think the views expressed by the supreme court of Tennessee in the case of *Palmer* v. *Southern Express Co.*, 165 S. W. 244, in paragraphs 7 and 8 of its opinion, are sound, and that therefore this requirement is valid.

This brings us to the question whether Congress exceeded its power in enacting the Webb-Kenyon Act.

"The power vested in Congress to 'regulate commerce with foreign nations, and among the several states, and with the Indian Tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts and cannot be stopped at the external boundary of a state, but must enter its enterior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23; *Brown* v. *Mary-*

land, 25 U. S. (12 Wheat.) 419, 6 L. Ed. 678." *Leisy* v. *Hardin,* 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.

"The power to regulate commerce includes the power to declare what property or things may be the subject of commerce, and therefore Congress has power to prescribe what articles of merchandise shall not be the subject of interstate or foreign commerce." License Cases, 46 U. S. (5 How.) 504, 12 L. Ed. 256; *Bowman* v. *Chicago, etc.,* 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Leisy* v. *Hardin,* 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 135; *United States* v. *Gould,* 25 Fed. Cas. No. 15,239; *United States* v. *The William,* Fed. Cas. No. 16,700; *Charge to Grand Jury,* Fed. Cas. No. 18,269a.

This power to exclude any commodity from interstate commerce is as broad as the power to regulate from which it is derived—is therefore "complete in itself, acknowledging no limitations other than those prescribed in the Constitution." No limitation upon this power is contained in the commerce clause, and no such limitation contained in any other section of the Constitution has been called to our attention. In the License Cases, *supra,* Chief Justice TANEY expressly stated that:

"Congress, under its general power to regulate commerce with foreign nations, may prescribe what articles of merchandise shall be admitted, and what excluded; and may therefore admit or not, as it shall deem best, the importation of ardent spirits."

While the authority of the License Cases has been weakened and on some points entirely overthrown by a number of later cases of which *Bowman* v. *Chicago, etc., supra,* and *Leisy* v. *Hardin, supra,* are a type, in none of them was this statement of Congress' power by Chief Justice TANEY challenged, and in all of them the power of Congress to prescribe what commodities shall be legitimate subjects of interstate commerce was expressly conceded. A power to wholly exclude a commodity from interstate commerce necessarily embraces within it the

power to exclude it partially or when certain conditions exist. *Wilkerson* v. *Rahrer,* 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572. Therefore it seems clear that Congress was well within its power in declaring that it should be unlawful to transport into a state intoxicating liquor that "is intended by any person interested therein to be received, possessed, sold, or in any manner used . . . in violation of any laws of such state."

The commerce clause of the Constitution excludes state regulation and control only over interstate commerce in articles that are legitimate subjects of trade and, in the absence of congressional legislation declaring what are and what are not legitimate subjects of trade, the right of a state "to prohibit the importation and sale of articles inherently unworthy of commerce and unfit for the use of the people" is undoubted and has been more than once expressly held to exist by the supreme court of the United States. 17 A. & E. Enc. of L. 69; *Leisy* v. *Hardin, supra; Wilkerson* v. *Rahrer, supra; Austin* v. *State,* 101 Tenn. 564, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703. See, also, the numerous cases decided by the supreme court of the United States dealing with state quarantine and inspection laws.

When an article by common consent is admitted to be "inherently unworthy of commerce and unfit for the use of the people," or the reverse, no trouble arises in the absence of congressional legislation in determining whether or not commerce therein can be regulated or controlled by state laws. It is only when a reasonable difference of opinion can exist as to whether an article is inherently unworthy of commerce that difficulties in this connection arise; and with reference to such articles the legislature has power to determine whether or not they shall be subjects of intrastate commerce, and Congress undoubtedly has the power to determine whether or not they shall be proper subjects of interstate commerce. That intoxicating liquors belongs to this class

of commodities has been frequently decided by the supreme court of the United States, which has always upheld the power of the states to suppress altogether commerce therein which lies wholly within their borders. In *Mugler* v. *Kansas,* 123 U. S. 663, 8 Sup. Ct. 273, 31 L. Ed. 205, in upholding the power of the state of Kansas to prohibit the manufacture and sale of intoxicating liquor, the court used the following language:

"It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. . . . For we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil."

And again in *Crowley* v. *Christensen,* 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620:

"By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dramshop, where intoxicating liquors in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. . . . There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States."

If it be true that misery, pauperism, and crime largely "have their origin in the use or abuse of ardent spirits, . . . that the public health, the public morals, and the

public safety may be endangered by the general use of intoxicating drinks, . . . that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil," and since "there is no inherent right in a citizen to sell intoxicating liquors," it not being "a privilege of a citizen of the state or of a citizen of the United States," it would seem that the power of Congress to declare that it is not a legitimate subject of interstate commerce is beyond question. It is true that, as stated in *L. & N. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355, "by a long line of decisions, beginning even prior to *Leisy* v. *Hardin*, . . .it has been indisputably determined that beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;" but the court was there, as was the court in the long line of decisions referred to, dealing with intoxicating liquor as an article of commerce in the absence of any legislation on the subject by Congress. That both Congress and the state legislatures working together in "frank and candid co-operation for the general good" are without power to destroy commerce in an article of this character is unthinkable, and such a result could not have been intended by "The Fathers" in framing the Constitution. That Congress has power to so legislate as to permit a state's laws passed under its police power to regulate and control commerce in commodities shipped into the state from without, and before they would otherwise lose their interstate character, has never been seriously questioned, and whenever such legislation has been enacted it has always been upheld by the supreme court of the United States. In *Bowman* v. *Chicago, etc., supra,* it was said that a state "cannot without the consent of Congress, expressed or implied, regulate commerce between its people and those of the other states of the Union," and in *Leisy* v. *Hardin, supra,* that:

"While, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the

security of the lives, limbs, health, and comfort of persons and the protection of property, so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action."

Similar utterances appear in the opinions rendered in other cases decided by that court. In *Wilkerson* v. *Rahrer, supra,* in upholding the power of Congress to pass the Wilson Act, the court pointed out that by this act no power was delegated to the states, but that it simply removed an impediment to the enforcement of the state laws in respect to sales of intoxicating liquors while remaining in the packages in which they were imported; and the court further stated that:

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

The only difficulty that arises in this connection is that in *Rhodes* v. *State of Iowa, supra,* the court, in holding that the Wilson Act did not permit the laws of a state to operate upon intoxicating liquor brought into the state from without until delivery thereof to the consignee, declined to express any opinion on Congress' power to permit such laws to operate thereon immediately after it had crossed the state line. This power of Congress, under the construction placed upon the act there under consideration, was not involved, and the court very properly reserved it for future determination; but nothing in the opinion rendered indicates that a distinction will be drawn in the power of Congress to permit state laws to attach to and control commodities brought into the state from without after delivery to the consignee, and its power to permit such laws to attach to and control such

commodities immediately upon their crossing the state line, and before its transportation and delivery has been completed.

In further support of the foregoing views, we refer to the masterly opinion of the court of general sessions of Delaware in *State* v. *Grier,* 88 Atl. 579.

The decree of the court below will be reversed, and decree entered here sustaining the demurrer, dissolving the injunction, and dismissing appellee's bill.

Reversed.

PIGOTT v. STATE.

[65 South. 583.]

CRIMINAL LAW. *Trial. Instructions.*

An instruction for the state in a criminal case "that the jury do not have to believe a witness just because he testifies, and may take into consideration his interest if any, and believe or disbelieve any witness as the jury may find the truth in all of the testimony," is erroneous under the facts of this case as singling out for attack the testimony of accused who took the stand.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Judge.

O. A. Pigott was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

Price & Price, for appellant.

In *Woods* v. *State,* 67 Miss. 575, this court plants itself squarely on the proposition that it is erroneous to give an instruction, that the jury should consider the feeling and interest of any witness in connection with all the testimony in determining how far, if at all, they could believe such witness or consider such testimony.

This court has planted itself upon high ground in this case—"That the defendant is entitled to submit his testimony to the jury uninfluenced by any suggestions from the court." In *Buckley* v. *State,* 62 Miss. 705, this doctrine is again discussed and the rule of this court propounded so clearly that he who runs may read. There the court says: "The accused was a competent witness for himself, and it is error for the court to instruct the jury in trying one for murder, that in weighing the defendant's testimony, they should consider the interest he had in the results and that they may disregard it altogether, and that the defendant's testimony should be permitted to go to the jury without being prejudiced, impaired, or influenced by suggestions from the court as to its probable falsity.

In the *Spivey case,* 58 Miss. 858, this court went further and held that it was error to instruct a jury "That if the jury believed from the whole evidence that any witness or witnesses for the defendant, wilfully and knowingly testified falsely to any material facts in the case, that the jury should disregard the testimony of such witness and should disbelieve them altogether as unworthy of credit. Also condemned in *Finley* v. *Hunt,* 56 Miss. 221; *Owens* v. *State,* 80 Miss. 512; *Davis* v. *State,* 42 So. 541; *Jeffreys* v. *State,* 77 Miss. 761.

It may be argued that if there were other witnesses in the case, such instruction might refer to them, but if the court will read the special bill of exceptions, where the district attorney by his argument, taking Grace Harness out of the case, and taking Johnson out of the case, and reads the above quoted instruction to the jury, it will be seen that the state intended to direct his argument at Pigott. But it makes no difference if there were other witnesses in the case, or what the state intended, since in *Townsend* v. *State,* 12 So. 209, a Mississippi case, this court said: "It is error in a criminal case, where the defendant, though not the only witness in his

own behalf, was still the only witness interested, to charge that the jury might consider the interest of any witness in connection with all the evidence in determining how far, if at all, they would believe him, as this was in effect to single out and mark the defendant for discredit." In *Howell* v. *State,* 98 Miss. 493, it is held: "This instruction unmistakably singled out the defendant and marks him for discredit by the jury, and it is not true, moreover, that because of his interest in the result of the verdict, that the jury might arbitrarily reject this evidence and refuse to consider it." It will be noted that the court holds, as a matter of law, that it cannot be said that such an instruction, even where other witnesses testify for the defendant, refer to other witnesses. It refers to all witnesses and the defendant is one of them.

In *Howell* v. *State, supra,* the court, in passing upon a similar instruction given by the circuit court, pronounces it error and dismisses it with the statement: "This instruction omits the necessary qualifying words that the false testimony should have been given wilfully and corruptly, and this instruction has been repeatedly condemned by this court, so often, that it is unnecessary to refer again to the cases."

In *Wofford* v. *State,* 99 Miss. 759, the following instruction was under review: "The court charges the jury that they have a right in passing upon the weight of the evidence of any witness, to take into consideration the interest the witness may have in the case, one way or the other, if any is shown, and in this case if they believe that any witness has testified falsely to any material matter, they have a right to reject all the testimony of such witness if they see proper."

And the attorney-general sought to save the fatal error in this instruction by citing the *Waldrop case,* 54 So. 66, but the court speaking through Justice SMITH, said: "The fourth instruction granted by the court at

the request of the state is erroneous. It omits the qualifying clause that the false swearing must have been intentionally and corruptly done." The learned judge cites in support of that doctrine the following: *White* v. *State,* 62 Miss. 216; *R. R. Co.* v. *Hendrick,* 62 Miss. 619; *Davis* v. *State,* 89 Miss. 119; *Bell* v. *State,* 90 Miss. 104; *Turner* v. *State,* 95 Miss. 879; *Waldrop* v. *State,* 54 So. 66. The instruction in the instant case started out with the bald proposition that a jury does not have to believe a witness because he testifies in a case, inferentially telling the jury that they may disbelieve any witness who does testify in a case, and assign no reason, or rule approved by the court in refusing to believe such witness, simply disbelieving him, but the instruction in the second paragraph, after charging the jury that they do not have to believe a witness who testifies, points out clearly to them, that they may take into consideration the interest of such witness and believe or disbelieve him, as they believe the truth to be. Both propositions are false and are not founded in law or reason.

Frank Johnson, for appellee.

There were three instructions given for the state, all of which are criticized by the learned counsel for the appellant.

The first instruction is as follows: "The court instructs the jury that if you believe that any witness in this case has knowingly, and corruptly testified falsely to any material fact in this case, you may disregard such witness's testimony all together." This instruction does not offend against any of the doctrines laid down by this honorable court. In *Spivey's case,* 58 Miss. 858, the instruction which was condemned was too narrow. It simply told the jury that they might reject the testimony of any witness who had falsely testified.

The instruction in the present case expressly provides that the witness must have knowingly and corruptly

testified falsely to a material fact in the case. The instruction is, therefore, correct and not within the condemnation that has been pronounced upon any similar instruction in any of the decisions of this court as I respectfully submit.

The second instruction is as follows: "The court instructs the jury that you do not have to believe a witness just because he testifies in the case, and in passing on the testimony of any witness, you may take into consideration the interest of such witness if he had any and believe or disbelieve any witness as you believe the truth is from all the testimony in the case." The objection made to this instruction by counsel for the appellant is that it is necessarily directed to the testimony of the defendant and that it could not possibly apply to the testimony of any other witness in the case. The testimony of Grace Harness may be that of an interested witness. It was for the jury to decide whether she had an interest in the case or not as between Pigott and Brumfield.

REED, J., delivered the opinion of the court.

Appellant was indicted for the murder of Wallace Brumfield. He was convicted and sentenced to the penitentiary for life.

It is contended that the evidence in this case is not sufficient to uphold the verdict of murder.

The difficulty in which Wallace Brumfield was shot occurred after dark on a Saturday evening in June, 1913, in an open woods near to the village of Knoxo. Appellant was on his way home and going along a trail or path which he was accustomed to use. A colored man, Thad Ball, who was with Grace Harness, a young colored woman in a clump of trees near the pathway, hailed appellant to borrow a dollar from him. About this time Brumfield, in a buggy accompanied by John Magee, a colored man, drove up. Appellant and Brumfield were not acquainted with each other. Brumfield was in search

of the girl, Grace Harness, with whom he had had illicit relations. Magee got out of the buggy and called to Grace to go to Brumfield. Magee then left. He had used insulting words, and appellant had told him that he had better get away if he was speaking to him (appellant). Brumfield, as Magee was leaving, called and said to him that he would back him. Brumfield then got out of the buggy, advanced upon appellant, and an altercation followed in which appellant was knocked down by Brumfield, and as he arose fired one shot from a 25-caliber pistol, which struck Brumfield just above the heart and caused his death. Appellant left the place and went home. There were four persons present at the time the fatal shot was fired. Three testified—Grace Harness, T. B. Johnson, and appellant. That Ball was not introduced. Grace Harness testified that, as Magee ran off, Brumfield told him to come back, that he would back him; that Brumfield got out of his buggy, and the difficulty between him and Pigott started; that both parties were cursing, and Brumfield applied a very vile epithet to appellant; that one of the parties slapped the other, and then Brumfield knocked appellant down; that she was then getting away from the place, but saw appellant fire his pistol, but did not know what Brumfield was then doing. Johnson's testimony shows that Brumfield got out out of his buggy, cursed appellant, saying, "I will kill you," advanced upon and hit him several times, knocking him down; that Brumfield then began to pull his pistol and had it nearly out when appellant fired upon him. Appellant's own testimony shows that he had been attacked by Brumfield and knocked down; that, as he was arising and trying to get away, Brumfield was attempting to draw his pistol and threatening to shoot; and that he (appellant) thereupon fired, when Brumfield lowered his hand and sat down. Appellant testified that at the time he did not know who the person was he was in the difficulty with; in fact, whether his assailant was a white man or a negro.

We do not see in the evidence in this case proof of the crime of murder. The circumstance of appellant's failure to tell of the difficulty just after it happened and until the body of deceased had been found and it was ascertained that his death was caused by a ball from a 25-caliber pistol may indicate that he did not act with the best judgment consistent with innocence, but can hardly amount to proof to supply the deficiency in the testimony giving the actual facts of the occurrence. We fail to find any proof showing motive, or malice, or deliberate design on the part of appellant. He is a man of family and of good character. He did not have an engagement that evening with Grace Harness and had never had an engagement, or any association, with her. The meeting upon this occasion when she was with Thad Ball was by chance. While he was on his way home, going along a path he had the right to travel, he was attacked by a man, a stranger to him. According to the state's evidence, he was cursed by this unknown person, who applied the vilest of epithets and then knocked him down. A very brief time, perhaps only a few minutes, intervened between the arrival of Brumfield and his attack upon appellant. Appellant did not have opportunity to deliberate. Suddenly and in the dark he found himself in serious combat with an unknown man. He had not accosted or stopped the stranger, or brought on the difficulty. He shot a man, unknown to him, a few minutes after meeting, and after the man had cursed him and knocked him down. Considering all of the testimony for the state in its most favorable aspect, it can only be said that appellant acted in the heat of passion. The evidence for appellant presents a case of self-defense. The court committed error in submitting to the jury the question of appellant's guilt of murder.

Appellant complains that the court erred in giving the second instruction for the state, which reads:

"The court instructs the jury that you do not have to believe a witness just because he testifies in the case,

and, in passing on the testimony of any witness, you may take into consideration the interest of such witness, if he has any, and believe or disbelieve any witness as you believe the truth is from all the testimony in the case."

This instruction should not have been granted. Under the facts of this case, it is necessarily directed to the testimony of appellant. It singles out and marks him for discredit. Such instructions have been condemned by this court. *Buckley* v. *Dunn,* 67 Miss. 710, 7 So. 559, 19 Am. St. Rep. 334; *Woods* v. *State,* 67 Miss. 575, 7 So. 495; *Townsend* v. *State,* 12 So. 209.

Reversed and remanded.

FERGUSON v. STATE.

[65 South. 584.]

1. JURY. *Selection. Drawing jurors for trial. Code* 1906, *section* 2629. *Irregularities. Harmless error.*

Code 1906, section 2692, providing that in counties containing two circuit court districts, a juror shall not be required to serve out of his district, except the court in its discretion should otherwise direct, and except when drawn on a special venire, and in either of such excepted cases the jury shall be drawn from the two jury boxes, if the court so direct, one name from each alternately, clearly authorized the summoning of a special venire from both districts of a county containing more than one district, and where the jury boxes from one of the districts had been exhausted, the trial court committed no error in not directing that one name be drawn from each district alternately; it being impossible in such case to be done.

2. SUMMONING AND IMPANELING JURIES. *Irregularities. Harmless errors.*

Where there is no evidence that accused was not tried by a fair and impartial jury, error cannot be predicated upon irregularity

in the drawing or impaneling thereof since Code 1906, section 2692, in relation to impaneling juries is declared by section 2718, Code 1906, to be merely directory.

APPEAL from the circuit court of Yalobasha county.

HON. N. A. TAYLOR, Judge.

Walter Ferguson was convicted of manslaughter and appeals.

The facts are fully stated in the opinion of the court.

I. T. Blout, for appellant.

The first and most important question, to the defendant, to be discussed in this case, is whether or not, he has had a constitutional trial by a legally constituted jury. If he has not, this court will not hesitate to grant him that right. The prerequisite to an impartial jury trial, is the empaneling of a jury according to the statute, and until this is done, according to the law then in force, there is no jury, and everything done in the trial, or supposed trial, is a nullity.

Code, 1906, chapter 72, section 2715, explicitly says how juries in capital cases shall be selected, and when a court departs from that law, he infringes on the rights of defendant and is on dangerous ground. Dangerous both to the state and the defendant.

Let us see for a moment what was done in this case. First, on arraignment, the district attorney, "moved the court, (see record page 7), for a special venire to consist of one hundred men to be summoned from the entire county" which motion being considered was sustained and the venire ordered drawn, in the following words: "And comes the district attorney in this case and moves the court, for a special venire to be drawn from the county at large, from both circuit court districts, of the county—fifty names to be drawn from the jury box of the second district and likewise fifty names to be drawn from the first court district of the county, such to be done owing to the fact that the legal jury box of the first dis-

trict, from which to draw, has been exhausted, and cannot serve as jurors in this case. Defendant by attorney objected and protested against these proceedings, for the reason as given, that there is no law to authorize such. (Objection overruled).

The evidence introduced, on which this order was based, was the testimony of D. E. Parks, circuit clerk, and it shows that there were two jury boxes in the county, one for the first and one for the second court district. He said the "names in the first court district had been exhausted." How exhausted? After this testimony was given, and without further ado, the court ordered arbitrarily, the issuance of the venire, defendant objecting to the proceeding for the venire issued and the return thereon, and to the drawing of the venire from the second district.

Conceding the discretionary power of the court, in organizing juries, that power (though directory only), does not go to the extent of abrogating the law, and allow judges to frame up juries regardless of the law. Nor do I understand that a court can make such aribtrary orders as was made in this case.

Frank Johnston, for appellee.

Yalobusha county is divided into two judicial districts. In this case a special venire of one hundred jurors was awarded by the court to be drawn from the county. Fifty of these were drawn from the jury box of district number one, and it appearing to the court by the testimony of the clerk and an examination of the jury box, that the jury box for the first district had been exhausted with the exception of only three names. The court then directed that the fifty men from district number one should be summoned to complete the special venire of one hundred, designated by the court,. It appears moreover, by the evidence before the court, that in a previous term of the court, all names had been drawn out of the

box for district number one and that all had performed jury service at a previous term of court. This being the precise condition of the jury box, an order was made by the court that fifty jurors should be summoned from district number one. This method of procedure, in procuring a special venire, is objected to by counsel as constituting a reversible error.

It was expressly held by this court in the case of *Steele* v. *State,* 76 Miss. 378, that it was not reversible error in a capital case to refuse, before and after exhausting the regular venire, to receive, as a juror, a member of the special venire who was absent on the call, but who, when he was present, was offered by the defense and thereupon order tallisman to be summoned, where the record show that the refusal was not thereby prejudicial to the defendant. It is the usual practice where there are not enough names in the jury box, or in case where the special venire has been exhausted, without getting a jury for the court, to order the sheriff to go out and summon jurors to complete the venire.

Section 2716 of the Code of 1906, makes the mode and procedure provided by section 2715 simply declaratory. This was expressly held in *Campbell* v. *State,* 17 So. 441. In this case the court refuses to question the venire in a criminal case on the ground that the special venire was not drawn from the legal box prepared by the board of supervisors.

Section 2718 of the Code of 1906, also expressly provides that all the provisions of law in relation to the drawing and impaneling of jurors are directory merely. So this court held in *Head* v. *State,* 44 Miss. 731, that the supreme court would not interfere with the discretion of the trial court in impaneling juries unless injury resulted in the exercise of it.

In *Campbell* v. *State,* 17 So. 441, the court, in considering section 2715, said that the whole purpose of the statute was to secure an impartial jury, and when that was done the court would not reverse on technical errors

of procedure. The same rule, precisely, was held in *Buchanan* v. *State,* 84 Miss. 332. In this connection I beg leave to refer the court to *Tolbert* v. *State,* 71 Miss. 179.

It is clearly the correct constitutional procedure to draw the special venire, in a capital case, from the whole county and not a particular part of the county. I refer the court to section 90, par. N, of the state Constitution. It was construed in *Byrd* v. *State,* 82 Miss. 280, a case coming up from Perry county, in which the court held that it was unconstitutional for the legislature to attempt to limit the drawing of a special venire from one district of a county which was divided into two districts, that the general law governed, and that it was the proper constitutional method to proceed under the general law which made the special venire to be drawn from the whole county.

Upon these decisions of this honorable court I respectfully submit that there is no error in the mode of procedure adopted by the trial court in ordering this special venire and in selecting the jury to try this defendant.

SMITH, C. J., delivered the opinion of the court.

Appellant was indicted for murder and convicted of manslaughter.

The county of Yalobusha is divided into two circuit court districts. When the case came on for trial, the district attorney requested the court to order a special venire from the county at large, fifty names to be drawn from the jury box of the second district and fifty competent jurors to be summoned from the first district. This was objected to by the defendant "for the reason that there is no law authorizing any such proceeding." The jury box for the first district had been practically exhausted; there remaining therein the names of only three persons. The court sustained this motion, and fifty names were drawn from the jury box of the second dis-

trict and the sheriff directed to summon fifty competent jurors from the body of the first district. Section 2692 of the Code of 1906 provides:

"In such counties (referring to counties in which there are two circuit court districts) a juror shall not be required to serve out of his district, except the court in its discretion should otherwise direct, and except when drawn on a special venire; and in either of such excepted cases the jury shall be drawn from the two jury boxes, if the court so direct, one name from each alternately."

This section clearly authorized the summoning of a special venire from both districts of a county containing more than one district, and, on account of the fact that the jury boxes from one of the districts had been exhausted, the court below committed no error in not directing that one name be drawn from each district alternately; it being impossible for this to be done. Moreover, since there is no evidence that appellant was not tried by a fair and impartial jury, error cannot be predicated of an irregularity in the drawing or impaneling thereof, since the statutes on the subject are declared, by section 2718 of the Code of 1906, to be directory merely. *Buchanan* v. *State,* 84 Miss. 332, 36 So. 388.

The court committed no error with reference to the other matters complained of.

Affirmed.

STATE v. OWEN.

[65 South. 641.]

INTOXICATING LIQUOR. *Offenses. Place. Code* 1906, *section* 1771. *Laws* 1908, *chapter* 115.

An indictment charging defendant with having assisted a third party to buy whiskey in a place outside the state, charges no offense. Since under Code 1906, section 1771, as amended by Laws 1908, chapter 115, making it an offense to act as agent or assistant to either the seller or purchaser in effecting a sale of any liquor, a sale of which is unlawful under the provision of the act, the sale of whiskey outside the state is not unlawful or violative of the provisions of said act.

APPEAL from the circuit court of DeSoto county.

HON. N. A. TAYLOR, Judge.

Jim Owens was indicted for acting as agent in the sale of intoxicating liquor. From an order sustaining a demurrer to the indictment the state appeals.

The facts are fully stated in the opinion of the court.

J. M. Varderman, for appellant.

The laws of Mississippi relating to intoxicating liquors do not require a person to sell liquor; if he acts as agent he is as guilty as if he had sold the liquor. Under the facts stated in the affidavit in this case it appears to me that this case would be governed by the *Hart case,* 87 Miss. 182, wherein the court had before it practically the same state of facts as exists in the case at bar. In that case the court held that a crime had been committed and that appellee was guilty of acting as agent, even though the liquor was ordered from out the state. In the course of the opinion the court said: "A sale of intoxicating liquors was made. Appellant assisted in effecting the sale, and acted as agent of the seller in this state at a place 'in which the sale of such liquor is prohibited by

law.' This constitutes the specific offense dealt with by this particular statute, and every element of appellant's guilt is plainly shown." *Hart* v. *State,* 87 Miss. 182, 39 So. 526. This case is the leading case in Mississippi and has been quoted and followed in numerous cases. See *Powell* v. *State,* 96 Miss. 608, 51 So. 465, which cites and follows the *Hart case, supra.* The case of *Anglin* v. *State,* 96 Miss. 215, 50 So. 492, 728, is also a leading case on the question before the court in the case at bar.

With these considerations I submit this case to the court and insist that the judgment of the lower court be reversed and appellee be required to answer for his crime.

COOK, J., delivered the opinion of the court.

Omitting the formal parts, the indictment in the present case reads—

"did unlawfully on the 7th day of October, 1913, within said district, county and state, become the agent of one Will Hughey, to procure for him, the said Will Hughey, four quarts of whisky out of the state of Mississippi, and to bring into said state, county, and district above mentioned said four quarts of whisky, and intended to deliver the same to the said Will Hughey. And that in pursuance of such agency, the said Jim Owens unlawfully did act as agent, and did assist Will Hughey, the purchaser, in effecting the sale of whisky, and unlawfully did, on or about the 7th day of October, 1913, procure out of the state of Mississippi, and bring into the same, and unto the county and district aforesaid, the said four quarts of whisky, with the intent of him, the said Jim Owens, to deliver the same to the said Will Hughey, as agent of the said Will Hughey, against the peace and dignity of the state of Mississippi."

To this indictment a demurrer was interposed. The demurrer was sustained, and defendant was discharged, from which judgment the state prosecutes this appeal

In the brief for the state we find this observation:

"From a careful reading of the affidavit in this case it appears that appellee had gone out of the state of Mississippi, procured whisky for Will Hughey, and delivered same to him in Mississippi, thereby acting as agent for the said Will Hughey in violation of the Code of 1906, section 1771, amended 1908, chapter 115."

It will be noted that the alleged crime charged against appellee is alleged to have been committed on the 7th day of October, 1913. The indictment is therefore drawn under chapter 115 of the Laws of 1908. A comparison of section 1771 of Code 1906 with the amendment of this section appearing on page 118, Laws of Mississippi 1908, discloses an important change in the statute, by omitting therefrom these words, "the sale of which without license is unlawful under the provisions of this chapter, in any county, district, territory, or municipality in which the sale of such liquor, bitters or drinks are prohibited by law," and inserting in lieu thereof these words, "the sale of which is unlawful under the provisions of this act." Under section 1771, Code 1906, it was made a misdemeanor to assist "in effecting the sale" of intoxicating liquors in any county, district, or municipality wherein the sale of such liquors was forbidden by law. This court, construing this section, in *Powell* v. *State,* 96 Miss. 608, 51 So. 465, said:

"The crime defined by the statute is committed when the assistance rendered either the seller or the purchaser in effecting a sale is rendered in a place where such sale is prohibitd by law."

The amendatory statute (chapter 115, Laws of 1908) provides that the crime is committed when assistance is rendered to the seller or purchaser in effecting a sale, "which is unlawful under the provisions of this act." The indictment in this case charges the defendant with having assisted Will Hughey to buy whisky in a place outside the state of Mississippi, and of course the sale

of whisky outside the state of Mississippi is not "unlawful under the provisions of this act." Chapter 115, Laws of 1908.

It is not a violation of the law to buy whisky outside the state, and as the sale outside the state was not unlawful, the indictment charges no violation of any of the provisions of chapter 115, Laws of 1908.

Affirmed.

HOWELL v. STATE.

[65 South. 641.]

JURY. *Qualification. Opinion.*

In the trial of a criminal case, a juror is competent, who on his *voir dire*, states that while it might take evidence to remove the opinion he had, he could go into the jury box and try the case fairly and impartially according to the law and the evidence, and that what he had heard on the outside would not affect him in deciding the case, and that he could try it just as if he had never heard of the case at all.

APPEAL from the circuit court of George county.

HON. J. J. BALLENGER, Judge.

Frank Howell was convicted of robbery and appeals. The facts are fully stated in the opinion of the court.

Cowart & Moss, for appellant.

The attorney-general dwells at length on the competency of the proposed jurors, Kennedy and Eubanks. In reply to his argument, we cite and rely on, in support of our contention that said proposed jurors were incompetent, regardless of section 2685 of the Code of 1906; *Klyce* v. *State,* 79 Miss. 652, 31 So. 339; *Murphy* v. *State,* 92 Miss. 203, 45 So. 865. The cases above cited are comparatively recent and in point. In *Murphy* v. *State,* the

voire dire examination of juror Dixon revealed facts very similar to those brought out in the *voir dire* examination of jurors Kennedy and Eubanks in the case at bar. It will be noted that Mr. Dixon, in that case, testified that he would be governed by the law and evidence, notwithstanding his having fixed opinion that it would take evidence to remove. Judge MAYES who delivered the opinion of this court in that case, said: "By the very terms of the statute itself, no fixed and invariable rule can be established by which, in all cases, the competency or incompetency of a particular juror may be established. The statute confides the determination of this question in each case to the sound discretion of the court. In this case we think the court should have sustained the challenge to juror Dixon for cause, and not have required the defense to exhaust all their peremptory challenges in order to get rid of him. The examination of this juror, in the light of all his testimony makes the case quite distinct from the *Cook case* in 43 So. 619."

In *Klyce* v. *State,* reported in 31 So. at page 339, almost identical facts were brought out on the *voir dire* of juror Raper as that brought out in the *voir dire* examination of Kennedy and Eubanks in the present case. In that case the trial Judge overruled defendant's challenge of juror Raper for cause, and Judge CALHOUN, in delivering the opinion of this court, said in part: "We dissent, with great diffidence, from the opinion of the very able judge who presided, that this person was a competent juror, not to be challenged for cause. We are sure he will concur with us that no accused person would think that juror impartial if it concerned his life or liberty, and this is no bad test. It is true, the ruling made can find support in certain loose expressions in some of the opinions of some courts; but we have been cited to no case, nor have we found any, where a juror was declared competent under facts like those here. Section 26 of our Constitution guarantees a trial by an

impartial jury of the county where the offense was committed.

This guaranty to each and every citizen by the fundamental law is, of course, sacred ground—the holy of holies—not to be invaded by the tread of legislature or courts. It was a very wise and enlightened provision, and far more important of enforcement than avoiding any inconveniences and difficulties arising out of the notoriety of particular cases. Our own legislature, in section 2355 of the Code, has gone to the very extreme length of the law-making power. This section is constitutional, but it manifestly not only hampers the court in determining for itself the question of the impartiality of the person tendered as a juror, but, on the contrary, throws the *onus* on the court, in the exercise of its enlightened discretion, to decide whether or not the person tendered can try the case impartially. It is also careful to provide that the exclusion of a juror shall not be assignable for error, thus emphasizing the idea of liberal interpretation in favor of the accused. Nor does the section necessarily imply that a man is competent who has a fixed opinion. It simply uses the words "impression or opinion." The collocation is significant, in view of the antecendent law as announced by the courts, many of which had gone nearly or quite to the length of the statute. But the statute leaves it to the trial court to exclude any juror it may think not impartial, whether from impression or opinion, without liability to question. It would nullify the constitutional provision, and seriously endanger the fairness of trials, to hold a juror, who has an opinion, competent merely because he says he could try the case impartially. He may say so, but it is for the court to say whether he in fact can, viewed in the light of the weakness of human nature. We are constrained to think that a man, who has heard the facts from the state witnesses, believes what they told him, and from that has formed and expressed an opinion

which he still retains, is not an impartial juror, in the meaning of the Constitution, whatever may be his own idea of his own power to try impartially."

Therefore, we earnestly submit that, viewed in the light of the opinions of this court above cited, the jurors, Kennedy and Eubanks, were wholly incompetent as shown by their *voir dire* examination.

Frank Johnston, for appellee.

I respectfully submit to the court that there can be no doubt about the correctness of the ruling of the trial court in regard to the competency of these two jurors. Section 2685 of the Code of 1906, prescribes the rule on this subject in regard to the competency of jurors which is simply this: That a juror is competent in any criminal trial, although he has an impression or opinion in respect to the guilt or innocence of the accused, provided it appears to the satisfaction of the court that he has no bias, or feeling, or prejudice in the case, and no desire to reach any result, except that to which the evidence may conduct.

These jurors were competent under the clear, explicit and positive terms of this statute. It did appear that they each had an opinion or impression based on outside talk about the case, and it did appear, to the satisfaction of the court, that they could try the case fairly and impartially on the law and evidence and a true and just verdict reach, without any bias or prejudice in the case. This statute is a modification of the rule at common law about the competency of jurors who had formed or expressed an opinion about the case. It may be and is often the case, that a juror who has an impression or opinion in a case may not only be a competent juror, but a model juror on the trial of an issue in a criminal case between the state and the defendant. The common-law rule was too strict and often resulted in the exclusion of the very best class of citizens from the jury panel in a criminal case.

This statute had been held to be constitutional in all respects under the provision of the constitutional guarantee of an impartial jury. *Logan* v. *State,* 50 Miss. 269; *Green* v. *State,* 72 Miss. 522. This subject was much discussed in *Klyce* v. *State,* 79 Miss. 652. It was held expressly that this statute does not necessarily imply that a man is incompetent who has formed an opinion in regard to the case.

The whole principle involved under this statute as well as under the common-law rule is that it is the duty of the court to see that a fair and impartial jury is selected to try the case. *Ferniday* v. *Selser,* 5 How. 506; *Gillan* v. *Brown,* 43 Miss. 641. In *Logan* v. *State,* cited *supra,* and *Green* v. *State,* it was expressly held that a juror was not disqualified because he had formed an opinion of such a fixed character that it would require evidence to remove it, provided he made oath, and the court was satisfied that he could try the case fairly and impartially, according to the law and evidence.

I will submit, in conclusion on this subject, that, under section 2685, the matter of selecting the jury and all questions in regard to the competency of the jurors, is largely within the discretion of the trial court. The trial judge has far better opportunity of seeing the jurors and personally examining them. He can observe the manner and the temper, and the disposition of the jurors, and can, therefore, more intelligently decide the question as to the state of mind of the juror. In this case the competency of these two jurors comes clearly within the operation of section 2685, of the Code.

REED, J., delivered the opinion of the court.

Appellant was convicted on the charge of robbing his grandfather. The verdict of guilty is sustained by the evidence.

It is contended that the trial court erred in overruling appellant's challenge of two jurors, for cause. It is ar-

gued that the jurors challenged had fixed opinions as to the guilt or innocence of appellant which would require evidence to remove, and that they were therefore incompetent.

The testimony of the juror Kennedy, when he was examined on his *voir dire,* shows that, while it might take evidence to remove the opinion he had, he could go into the jury box and try the case fairly and impartially according to the law and the evidence, that what he had heard on the outside would not affect him in deciding the case, and that he could try it just as if he had never heard of the case at all. We quote the following question and answer from his testimony: "Q. Is that a fixed opinion that you have? A. No, sir."

The juror Eubanks on his *voir dire* testified that the opinion he had would not interfere with his trying the case fairly and impartially on the law and evidence, and he would not be influenced by what he had heard on the outside. Continuing, Mr. Eubanks in his testimony said: "What I heard on the outside I did not take to be facts."

The court was entirely correct in holding that these jurors were competent. We do not think that their testimony shows that they had a fixed opinion which would disqualify them. What they referred to as an opinion, it appears from the testimony, was a mere impression. It is certainly shown that they were impartial in the case, and did not desire to reach any result except that to which the evidence would conduct them. They are not shown to have any bias or feeling of prejudice in the case. *Cook* v. *State,* 90 Miss. 137, 43 So. 618; *Schwartz* v. *State,* 103 Miss. 711, 60 So. 732.

Affirmed.

DAVID SMITH *v.* STATE.

[65 South. 498.]

1. CRIMINAL LAW. *Instructions. Form of verdict. Trial. Construing instructions together. Verdict. Form and requisites. Surplusage.*

An instruction for the state in a murder case, that the jury may "if warranted by the evidence" find defendant not guilty, is not misleading, where numerous other instructions for the defendant, informed the jury that it was their duty to acquit the defendant, if they had any reasonable doubt of his guilt arising out of the evidence or the want of evidence in the case.

2. SAME.

In order to arrive at the proper meaning of an instruction, all the instructions both those given for the state and those given for the defendant must be considered together.

3. VERDICT. *Form and requisites. Surplusage.*

Where in a prosecution for murder, the jury were plainly instructed as to the form and effect of their verdict and returned the following verdict, "We, the jury, find the defendant guilty as charged, but disagree as to the punishment and ask the mercies of the court" and when the verdict was returned the jury were polled and answered that this was their verdict, and there was no request made to the court for inquiry as to what was meant by the verdict, the court was correct in treating that part of the verdict "and ask the mercies of the court," as surplusage.

APPEAL from the circuit court of Tishomingo county.

HON. CLAUDE CLAYTON, Judge.

David Smith was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

Bennett & Elledge, for appellant.

Referring to the third assignment of error which is that the court erred in giving the fifth instruction given for the state, the last paragraph of which reads as follows: Or they may return, if warranted by the testimony,

the following verdict: "We the jury find the defendant not guilty." We do not understand that the jury should be warranted by the testimony in order to acquit. They may acquit for the lack of testimony or evidence. Is a defendant required to prove his innocence? We submit that the instruction amounts to informing the jury that the defendant is required to meet testimony, whether sufficient to convict or not, before they would be warranted in bringing in a verdict of not guilty.

It may be urged that the error in this instruction, if any, was and is cured by instructions for the defendant. We contend that the instruction is such that it is fatal error to give it and no amount of instructions for the defendant could cure the error. Who is in a position to say that under all the circumstances in this case the defendant was not prejudiced by this instruction when the defendant staked his case on a conviction as charged or an outright acquittal? The defendant was either guilty as charged or he was entirely innocent. Refering now to the fourth and all subsequent assignments of error, all of which go to the form and sufficiency of the verdict—to the contention that no verdict has been rendered in this case.

A jury verdict is one thing, while the language used to convey that verdict into court is quite another thing; the jury verdict is the meeting of the minds of twelve jurors, on the issue presented to them by the parties, in the light of the law as given them by the court in instructions; the language used by the jury is but the vehicle for conveying the verdict to the court. The jury in this case returned into court the following: "We, the jury, find the defendant guilty as charged but disagree as to the punishment and ask the mercies of the court." The jury in this case was instructed that: The court charges the jury for the state that they may return either of the following verdicts in this case if warranted by the testimony: First: "We, the jury, find the defendant

guilty as charged" in which event it will be the duty of the court to sentence the defendant to be hanged. Second: "We, the jury, find the defendant guilty as charged but disagree as to the punishment." In which event it will be the duty of the court to sentence the defendant to the penitentiary for his natural life. Third: "We, the jury, find the defendant guilty as charged" and fix his punishment at imprisonment in the penitentiary for life. In which event it will be the duty of the court to sentence the defendant to the state penitentiary for his natural life.

In the face of the second and third paragraphs of this charge, can it be said that the jury in this case found by their verdict that this defendant should be sentenced to the pentitentiary for his natural life? The jury in this case was thoroughly instructed as to the form of their verdict and the consequent penalties that would follow the bringing in of either of said verdicts, and in view of this fact we insist that the recommendation to mercy cannot be treated as surplusage.

Under the circumstances of this case and the aforesaid instructions, paragraphs two and three, we think that, as a matter of fact, the jury never reached a verdict and never returned a verdict into court. The concurrence of the minds of twelve jurors is necessary to a verdict and the defendent is entitled to this or to a mistrial. As stated in some of the cases the verdict is vague, ambiguous and clouded. *Smith* v. *State,* 75 Miss. 556, 558; *Owens* v. *State,* 82 Miss. 25, 30; *Avant* v. *State,* 88 Miss. 227; *Sykes* v. *State,* 92 Miss. 250.

The trial court, in this case, treated the recommendation to mercy as surplusage and entered it accordingly; this appears to be the course taken by the trial court in the *Owens case* cited above. In the light of this record and the above cases this verdict cannot be lightly passed over; we cite the Sykes case above and we note that the court states in its opinion in that case that the trial court

erred in not requiring the verdict cleared up and that it (the supreme court) "would not be willing to reverse for this error alone." The language of the court here will have to be passed as *dictum;* to say the least of it, it cannot be said that the court, in the Sykes case, intended to allow more latitude in the matter of the verdict of a jury in a criminal case; the law and the reasons for the law in the Smith case, the Owens case and the Avant case, goes back to our definition of a jury verdict given above and until the jury do agree in this manner, there is no verdict.

Geo. H. Ethridge, for appellee.

It is insisted that the fifth instruction for the state was erroneous for the reason that it tells the jury that they may return a verdict of not guilty if warranted by the testimony. The instruction is in the form of a verdict, and the jury are told that they may return either of the following verdicts if warranted by the testimony—this embraces a finding of guilty as charged, guilty as charged with a disagreement as to the punishment, guilty as charged with the fixing of the punishment at imprisonment for life, and guilty of manslaughter, or finding of not guilty.

While it is true that a verdict of not guilty can be predicated on the absence of a sufficient amount of evidence, yet the evidence of the case warrants the instruction of not guilty where the evidence is insufficient. The verdict that a jury may return under the law must, in any case, be reached from a consideration of the evidence in the case. The consideration of the evidence in the case must, on account of the absence of a sufficient amount of probative or positive evidence, warrant a discharge. In a case, however, where several different verdicts may be rendered according as the jury may believe from the evidence is right and proper, it cannot be said that the jury can find arbitrarily on any of the different hy-

potheses. The jury must always be governed by the testimony. It is their duty to acquit when the testimony is not sufficient to convince the mind beyond a reasonable doubt that the hypothesis of guilt is established. In construing instructions in a case, the court looks at the entire instructions, both for the state and the defense and they are construed together, one as limiting, explaining or modifying another. If the jury are told, in the instructions, that they may reach a verdict of acquittal because of a want of testimony, the defendant has gotten the benefit of all rights under the law.

In instruction two for the defendant, the jury are expressly told that if any member of the jury has a reasonable doubt of the guilt of the defendant arising out of the evidence or the want of evidence, it is the duty of the jury to acquit. In instruction three, the same information is given the jury that if there is a reasonable doubt from the lack of evidence, that they should acquit the defendant. The same is in instructions four, five, seven, and thirteen, and the jury are fully instructed in the case that a lack of evidence to convict made it their duty to acquit. There could be no possible reason to believe that the jury were misled upon this point. The hypothesis of manslaughter was given in two instructions for the state and any prejudice growing out of any of the other instructions that would have eliminated manslaughter are expressly cured by these instructions where manslaughter was defined and the jury are told that if the evidence warrants a verdict of manslaughter under such definition that they could so find.

It is next insisted that the verdict of the jury is insufficient to support the judgment of conviction. The jury returned the verdict in the court finding the defendant guilty as charged and disagreed as to the punishment and asked the mercy of the court. The court, at the request of counsel for the defendant polled the jury and asked each of the jurors if that was the verdict of

the jury. The jury and each members of it stated that that was the verdict of the jury. There was no request shown in the record made to the court for any further inquiry as to what was meant by the verdict or what the attitude of the jury was with reference to the punishment and it does not appear from the record that any of the jurors would not have rendered the verdict if they had been informed that the verdict carried life imprisonment in the state penitentiary. In the cases cited by counsel for the appellant, the court in each case was requested to interrogate the jury and clear up the verdict. In the *Smith case,* 75 Miss. 556, which was the leading case in that subject, the attorney for the appellant requested the court below to interrogate the jury as to what the jury meant by asking the mercies of the court in a verdict of guilty. The court declined to do so and the defendant excepted to the court's action. The counsel for the defendant thereupon requested the court to permit him to so interrogate the jury and this was denied by the court and excepted to by the defendant. The same is true in the other cases where the question has been presented. In none of them, did the party remain silent and accept by acquiescence the verdict of the jury. The case now before the court has been settled against the contention of the appellant by the case of *Penn* v. *State,* 62 Miss. 450. In the Penn case, the jury returned the same verdict except they didn't state that they disagreed as to the punishment, and were polled and each juror responded that it was his verdict, and the court expressly held that this was a good verdict and the words, "begging the mercy of the court" was mere surplusage. Under the law as it now exists, a defendant gets the benefit of mercy by operation of law. Under the law as it existed when the Penn case was decided, a verdict was followed by the death sentence. The jury were expressly informed that it would be the duty of the court to sentence the defendant to a life term in the state peniten-

tiary. They were, perhaps, under the impression that for the court to do this rather than to inflict the death penalty, recommendations of mercy would be necessary or proper.

Certainly, a party cannot remain silent under the circumstances and not request the court to take any further action and then insist on appeal that, because the court did not ask the jury as to what it meant, that the verdict should be set aside, when, under all the authorities, the verdict itself is a good verdict.

REED, J., delivered the opinion of the court.

Appellant was convicted on a charge of murder and sentenced to the penitentiary for life. He killed another young man, George Bullard, by stabbing him repeatedly, some nine times, with a knife. The evidence in the case is sufficient to sustain the verdict of guilty returned by the jury. We see no error in the action of the court in refusing to direct the jury to bring in a verdict of not guilty.

The giving of the fifth instruction for the state is assigned as error. Appellant complains particularly of the concluding words of the instruction, which are as follows:

"Or they may return, if warranted by the testimony, the following verdict: 'We, the jury, find the defendant not guilty.' "

We quote the entire instruction No. 5 in order that it may be seen exactly the location and use of the words complained of therein:

"The court charges the jury for the state that they may return either of the folowing verdicts in this case if warranted by the testimony:

"First, 'We, the jury find the defendant guilty as charged.' In which event it will be the duty of the court to sentence the defendant to be hanged.

"Second. 'We, the jury, find the defendant guilty as charged but disagree as to the punishment.' In which

event it will be the duty of the court to sentence the defendant to the penitentiary for his natural life.

"Third. 'We, the jury, find the defendant guilty as charged' and fix his punishment at imprisonment in the penitentiary for life. In which event it will be the duty of the court to sentence the defendant to the state penitentiary for his natural life.

"The court charges the jury further that, if warranted by the testimony, they may return the following: 'We, the jury, find the defendant guilty of manslaughter.' Or they may return, if warranted by the testimony, the following verdict: 'We, the jury, find the defendant not guilty.' "

It is contended by counsel for appellant that the instruction "amounts to informing the jury that the defendant is required to meet the testimony, whether sufficient to convict or not, before they would be warranted in bringing in a verdict of not guilty."

This instruction is upon the form of the verdict. It tells the jury that they may return a verdict of guilty in any of several cases—three different verdicts upon conviction of murder, and a verdict upon conviction of manslaughter. In reference to manslaughter, it states that, "if warranted by the testimony," they may return the verdict of guilty of manslaughter, and then the instruction continues in the words above referred to and complained of, repeating the expression "if warranted by the testimony," and tells them that they can find the defendant not guilty. We only see in this general instruction information given to the jury of the formal wording of their verdict, and, in the event of the conviction of murder, the effect of the several different verdicts.

We must construe this instruction with all the other instructions in the case—those for the defense as well as those for the state. In order to arrive at the proper meaning of the several instructions given, all must be

considered together. We find that sixteen instructions were given in this case for the defense. At least six of these instructions clearly expresses to the jury their duty to acquit if they have a reasonable doubt of the defendant's guilt. It is fully stated in the instructions that this doubt can arise out of the evidence or want of evidence. We do not see, after consideration of all of the instructions, how the jury could have possibly been misled, or appellant prejudiced, by the words in instruction No. 5 by which they were told that they could find the defendant not guilty. We see no error in the granting of this instruction.

Another assignment of error argued in this case is:

"The court erred in receiving the vague, indefinite, and obscure verdict as a legal verdict of the jury in this case."

The following is the verdict returned by the jury:

"We, the jury, find the defendant guilty as charged but disagree as to the punishment and ask the mercies of the court."

When the verdict was returned, at the request of counsel for appellant, the jury was polled, and each juror answered that the verdict was his verdict. The record does not show that any further request was made to the court for inquiry as to what was meant by the verdict, and the attitude of the jury in reference to the punishment. The jury were plainly instructed as to the effect of the verdict they rendered. There is nothing in the record to show that the jury did not intend to convict appellant, even though his punishment might be life imprisonment. The court appears to have treated the words "and asks the mercies of the court" as surplusage. The court was correct in this. *Penn* v. *State,* 62 Miss. 450; *Sykes* v. *State,* 92 Miss. 250, 45 So. 838.

Affirmed.

LOW *et al.* v. BLACK BAYOU DRAINAGE DISTRICT.

[65 South. 643.]

DRAINS. *Drainage district. Establishment. Courts. Jurisdiction.*

Under section one of the Laws of 1912, chapter 195, providing for the creation of drainage districts, power is conferred upon the chancery court to create a drainage district only when the land embraced therein lies in more than one county, and where the only part of such district lying in another county is the bank of a bayou and land under a lake which cannot share in the benefits, the chancery court is without jurisdiction, and the fact that this lake and bayou can be used as outlets for the drainage system of the district is immaterial for the reason that the method by which such outlets are to be acquired is provided for in section 21, of the act.

APPEAL from the chancery court of Washington county. HON. E. N. THOMAS, Chancellor.

Proceeding for the establishment of the Black Bayou Drainage District. From a decree creating the district, W. A. Low and others appeal.

The facts are fully stated in the opinion of the court.

Campbell & Cashin, for appellant.

Our contention is that, having declined to establish the district prayed for, and having eliminated from consideration in the proceedings all of the lands lying in Issaquena county, leaving for consideration as to whether any district at all should be established, lands lying in Washington county only, this decree was, in effect, an order by the chancellor declining to establish the district prayed for, and that he had no further jurisdiction, because of this fact. But, if not correct in this, then said chancellor had no authority, under the act, to establish a district embracing lands lying in one county only, because jurisdiction to establish a district embracing lands in one county only is vested in the board of

supervisors, and not in the chancellor. If the chancellor did not think the district prayed for, embracing lands in two counties should be established, he should have entered an order refusing to establish it. That would have ended the matter. Then, if the landowners in Washington county alone wanted to form a district, they could have proceeded in the proper way before the board of supervisors.

After the entry of this order of August 12, 1913, eliminating the Issaquena county lands from consideration in the proceedings, we moved the chancellor to dismiss the petition for lack of jurisdiction. This motion was, by the chancellor, overruled, to which the remonstrants excepted.

The chancellor's idea, at that time, as he expressed it, in overruling this motion, was because of the well-known rule of equity jurisprudence, where a court of equity had assumed jurisdiction of a cause, it would retain such jurisdiction and administer complete relief, even though, since assuming jurisdiction, the original causes of equity, because of which the court assumed jurisdiction, had ceased to exist. We reminded the chancellor that, in this case, he was not sitting as a chancery judge, and that his jurisdiction, in this case, was not the same as in a chancery cause, and that this hearing, in no way, appertained to his duties as a chancery judge, and that his jurisdiction was, in no way, affected by the general principles of equity; that this was merely a statutory proceeding heard by the chancellor, the jurisdiction to determine which might as well have been vested in the board of supervisors, as it is, or in the sheriff, justice of the peace, or any other ministerial officer, and it was upon the idea thus expressed by him that he retained jurisdiction, and he so stated in dictating his opinion in this case in the presence of the writer of this brief, which original opinion is not to be found among the original papers in this cause. But, in what

purports to be a copy of the chancellor's opinion, which we have found since in the record in this case, was sent down, he stated: "having once obtained jurisdiction, I am of the opinion that no collateral change in the boundaries of the district could deprive the court of jurisdiction. As a matter of fact, it was not the case. A portion of the lands to be drained still lies in the county of Issaquena." The chancellor is entirely mistaken in this statement that "a portion of the land to be drained still lies in Issaquena county." No land to be drained by the district established by him lies in Issaquena county. He evidently based this statement upon this sentence in his decree of August 12, 1913, eliminating the Issaquena county land and some of the Washington county lands, belonging to P. L. Mann, Greenfield Plantation, C. L. Hasie, *et al.*, from the district, viz.: "Excepting, however, the banks of the lands under Swan Lake, Straight Lake, Lake Lafayette and Steele's bayou."

It may be true that the banks of a portion of Steele's bayou, and Lake Lafayette, and the lands lying under the waters of this bayou and lake, are in Issaquena county. The chancellor retained the banks of this bayou and these lakes, and the lands lying under them, in his order eliminating the lands in Issaquena county from the district, at the suggestion of the attorney who was attempting to have this district organized, in the effort and hope that he could thereby maintain his jurisdiction, and that this court would take the position that he did not lose jurisdiction by eliminating from the district all of the lands in Issaquena county, because he excepted from the decree of eliminating the lands in Issaquena county, and because he excepted from the decree of eliminating the banks of, and lands lying under, these natural watercourses. But these are not lands to be drained. Lake Lafayette is the outlet into which the drainage of all lands lying north thereof is to be

emptied. The outlet is first into Swan Lake; thence into Straight Lake and Steele's bayou, and thence into Lake Lafayette. That part of Steele's bayou lying south of Lake Lafayette, which is a navigable stream, of large flowing capacity, and about three hundred feet wide, is not a part of this district according to the boundaries in the original petition. It is not intended to drain the lands lying under Swan Lake, Straight Lake, Steele's bayou and Lake Lafayette. This would be an impossible task. They are merely the outlets into which the drainage will flow from Black bayou and the canals leading into Swan Lake; thence through Swan Lake, *via* Straight Lake and Steele's bayou, into Lake Lafayette; from Lake Lafayette into Steele's bayou and through Steele's bayou, into the Yazoo River, and from the Yazoo River into the Mississippi River.

It is no more contemplated to drain the lands under these streams and assess them than it is to drain the bed of the Mississippi River and assess that. It would be about as easy to do one as the other. It would seem that the chancellor ought to have known this. But the decree excluded the lands of P. L. Mann and the others seem to have been rather artfully drawn with the idea of maintaining jurisdiction upon the theory that the district still embraces lands in Issaquena county. But this is not the case. The district established by the decree does not embrace within it "lands" in Issaquena county, within the purview of the act, merely because the drainage waters will eventually flow into Steele's bayou, which is in Issaquena county. Unless we are correct in this, then the district also embraces lands under the Yazoo and Mississippi Rivers, and the Gulf of Mexico, because the drainage waters will eventually go there.

The statute provides that if the lands in more than one county is embraced in the proposed district, the application shall be addressed to the chancery court of either county, and all proceedings shall be had in the

chancery court, etc. By "lands" in this sentence, is meant lands which will be benefited by the drainage scheme, and which will be assessed for the purpose of constructing the same. Surely, it does not mean that because, in securing an outlet, it may be necessary to go beyond the limits of one county into another for the outlet, that the proceedings shall be in the chancery court when none of the lands to be drained and taxed, embraced in the district, lie in more than one county. Section 21 of the act authorizes the commissioners to condemn lands beyond the limits of the district for the purpose of securing an outlet and, of course, the commissioners must condemn, or acquire by purchase, an outlet through Swan Lake, Straight Lake, Steele's bayou and Lake Lafayette, if it becomes necessary to clear and dredge these streams. This, the engineer, Major Gorden, testifies would be necessary. Excepting the banks and lands lying under the beds of these streams from the lands in Issaquena county eliminated from the district, is nothing more than an abortive attempt to uphold the jurisdiction, which the chancellor clearly did not have. The chancellor's argument that he still retained the district land to be drained in Issaquena county is not correct. Not an acre of land to be drained or taxed is in Issaquena county.

Watson & Jayne, for appellee.

It is contended by appellants that the order of the chancellor in eliminating from the district the lands of C. L. Hesie, *et al.,* by order dated August 11, 1913, excluded from the district all of the land in the county of Issaquena, and, therefore, the chancellor was thereafter, without jurisdiction to proceed further under the act, for the reason that the jurisdiction would thenceforward belong to the board of supervisors of Washington county. This position is untenable. In the first place the court had jurisdiction of the whole case as stated by

the chancellor in his opinion, and having such jurisdiction, would retain it, and in the second place he found that the boundaries thereof extended into the counties of Washington and Issaquena counties, in the following language: "It is therefore ordered and adjudged that the Black Bayou Drainage District be and the same is hereby decreed, organized and established with the boundaries thereof extending in the counties of Washington and Issaquena, state of Mississippi." And after defining these boundaries, the exceptions, retains lands in both counties by the following language: "Including all of the lands under the bank of Swan Lake; also including the lands under the banks of Straight Lake; also including the land under the banks of Steele's bayou; also including the lands under and the banks of Lake Lafayette."

The latter lake and its banks lie wholly within the county of Issaquena and the evidence of B. B. Gordon, engineer, is to the effect that the area retained is over one thousand acres, and that it was necessary to have that territory in the district. Besides this, the territory in that county may be enlarged from time to time under section 7 of the act.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a decree creating a drainage district under the provisions of chapter 195, of the Laws of 1912. The petition prayed for the creation of a district embracing land in both Washington and Issaquena counties. When it came on to be heard the court eliminated from the district all of the land situated in Issaquena county, except the lands under and the banks of Lake Lafayette and part of Steele's bayou, so that the district when created contained no land in Issaquena county, except the banks of and land under this lake and bayou. Under section 1 of the statute here in question, power is conferred upon a chancery court to create

a drainage district only when the land embraced therein lies in more than one county, so that unless this district contains land in Issaquena county, the decree creating it is void. There is no contention that Lake Lafayette and Steele's bayou will be drained by the creation of this district, or that the land under them will share in either the benefits or burdens thereof. It is therefore not the character of land to be taken into consideration in the formation of a drainage district. The fact that this lake and bayou can be utilized as outlets for the drainage system of the district is immaterial for the reason that the method by which such outlets are to be acquired is provided for in section 21 of the statute.

Reversed and remanded.

HATHORN v. MORGAN, MAYOR OF TOWN OF WOODVILLE.

[66 South. 643.]

SCHOOLS AND SCHOOL DISTRICTS. *Separate districts. Review of decision. Code* 1906, *section* 80.

Under section 80, Code 1906, providing that any person aggrieved by judgment or decision of the board of a city, town, or village may appeal to the next term of the circuit court of the county, and may embody the facts and decision in a bill of exceptions, which shall be signed by the person acting as president of the municipal authorities, where the bill of exceptions was not taken and signed during the term of the municipal board at which the order complained of was passed, and it does not appear that the time for preparing and perfecting the bill was extended, into the vacation following the term. The mayor could properly refuse to sign a bill subsequently presented, even though the applicant had no notice that the matter had been presented to the board or of the passage of the order.

APPEAL from the circuit court of Wilkinson county.

HON. E. E. BROWN, Judge.

Petition for mandamus by Lucy E. Hathorn against W. A. Morgan, as mayor of the town of Woodville. From an order sustaining a demurrer to the petition, plaintiff appeals.

The facts are fully stated in the opinion of the court.

W. F. Tucker, for appellant.

Section 80, Code of 1906, grants the right of an appeal, without bond, to any person aggrieved by a decision of the municipal authorities of a town to the next term of the circuit court, and such aggrieved person may embody the facts and decisions in a bill of exceptions, which shall be signed by the person acting as president of the municipal authorities and the clerk of the municipal authorities shall transmit the bill of exceptions to the circuit court on or before the first day of the next succeeding term, or at once if the court be in session, etc.

It is true that, under said section 80, a bill of exceptions to the action of the board of municipal authorities should be taken and signed during the term; but in this case the appellant had no notice that a motion seriously affecting her vested rights would be made, and she knew nothing of the action of said board until some hours after its adjournment.

The framers of said section 80, expected all persons aggrieved by a decision of the municipal authorities to be in court or to have some kind of notice to attend a meeting affecting their rights and privileges. The appellant had none. The law gives her a right to an appeal to the next term of the circuit court of her county, which was on the fourth Monday, the twenty-eighth day of October, 1912; appellant prepared her bill of exceptions, embodied all the facts and decisions as she knew them from the records of the town's minutes. It was impossible for appellant to allege that the bill of excep-

tions contained all the facts and evidence transpired and taken in regard to the action of the board, for the appellant was not there, had no chance to be there, and the board seemed anxious to pull off their little motion while she and others interested were ignorant that any matter affecting their rights were under discussion by the board. This bill of exceptions was duly and legally certified to by the clerk of the town and said board, and presented to the appellee, as mayor of the town and president of the board of alderman, for his signature and approval; but appellee refused to sign the bill of exceptions because it was not taken and presented during the meeting of the mayor and board of alderman at the June term, 1912.

Shall the appellant be prejudiced by the act of the board of alderman? She had not opportunity to properly present her bill of exceptions. In *McGee* v. *Beall,* 63 Miss. 455, this court held that where a bill of exceptions as prepared during the term of which the judgment appealed from was rendered, but the president of the board of supervisors, for some reason, failed to sign it until after the adjournment of the term, "that the appellants having done all that was in their power by preparing and tendering a proper bill to the proper officer ought not to suffer by reason of his neglect to properly sign same."

The facts of this case and that of *McGee* v. *Beall,* are different, but the principal is the same. Appellant here has done all that was in her power, and all that was left by the board for her to do, and she should not be made to suffer by the acts of appellee.

A. H. Jones, for appellee.

Section 80, Code of 1906, provides the only method of obtaining appeals from the decision of municipal authorities, and those aggrieved by the action or decision of the authorities are to embody the facts in a bill of exceptions, which shall be signed by the president and the record is

thereupon prepared by the clerk of the board and certified to the circuit court. This bill of exceptions is subject to the same rules as one taken to the ruling of the circuit court, made during the term at which the action objected to is had, unless by consent of the parties, or under an order of the court to be evidenced by the record proper, or by a recital in the bill itself, the time for preparing and perfecting it be extended into the following vacation. *McGee* v. *Jones,* 63 Miss. 453, 455.

"Without these facts, and unless the bill of exceptions is prepared and signed in accordance with these simple and plain requirements the circuit court would have no jurisdiction. The statute, and the decision under it, plainly limit the time in which the appeal can be taken; if not taken in time, the appeal must be dismissed, even though the bill of exceptions be signed." American and English Enc., Pleading and Practice, 239, 240.

In the instant case, appellant in vacation, about four months subsequent to the adoption of the order complained of, demands of appellee that he sign a bill of exceptions presented him, without any showing that the board—the court, whose action is complained of—was informed of its contents, and without any showing, or even claim, that it was correct and contained all the facts before the board at the time of the adoption of the order. Appellee refused to sign it, and is now in court because of that refusal since appellant seeks to force him to do so.

Of what does appellant complain? To whose actions does she except? Surely to the action and decision of the board of mayor and alderman of the town of Woodville; it is the action of that board which she seeks to have reviewed, and it is from that action she desires relief. Therefore, it is essential that her bill of exceptions be presented to the board—the court—whose actions have aggrieved her, and when it is so presented to that board and has been settled and allowed by it, it then becomes the duty of the presiding officer to sign it. His signing

it, however, is in obedience to the finding of the board, and is not his individual action. No matter what his personal belief may be, no matter if he should think the bill incorrect, when the board has settled it, it is his inescapable duty to sign it.

No litigant, nor person aggrieved by the decision of these boards, shall suffer, by reason of the refusal of the presiding officer, to sign the bill of exceptions—if they have done what is required of them, the recalcitrant officer will be forced to do his duty, or it will be presumed to have been done. But it is necessary that the complaining person show that he has done what the law requires of him. *McGee* v. *Beall,* 63 Miss. 455.

The fact that appellant had no notice of the passage of the order cannot affect this question. The board of mayor and alderman had no notice of this bill of exceptions. Appellant would not seriously contend that if the board of supervisors of Wilkinson county, at its June term, 1912, passed an order distasteful to her, or aggrieving her, she could force the president of that board to sign a bill of exceptions in September, without any effort on her part to obtain relief from the board, or even without informing the board of her contemplated action.

The petition shows that the bill of exceptions was never presented to the board; the exhibit to the petition, being the bill of exceptions itself, shows certain orders of the board of alderman of Woodville, but it fails to show that any of these orders were before the board at the time of the passage of the order complained of, and it further fails to show that this was all before the board. The fact that the bill of exception was certified by the clerk of the board is immaterial, for the reason that the clerk has absolutely nothing to do with bills of exceptions other than to transcribe the when settled and allowed, and transmit them to the circuit court. Section 80.

Appellee was correct in his refusal to sign the bill. He is not the board of alderman, nor is he the one re-

sponsible for appellant's alleged injury. It is not his duty to usurp the power of the board, and to attempt to bind the board by certifying facts in a bill of exceptions not known to it.

REED, J., delivered the opinion of the court.

This appeal is from the action of the circuit court in sustaining a demurrer to the petition of appellant, praying for the issuance of the writ of mandamus commanding appellee, the mayor of the town of Woodville, and president of the board of aldermen thereof, to sign and approve a bill of exceptions.

The petition shows that at a regular meeting of the mayor and board of aldermen of Woodville at the June term, 1912, an order was passed releasing certain territory from the separate school district of Woodville; that appellant, feeling aggrived at the decision of the board, prepared a bill of exceptions embodying the facts and decision of the board in passing the order, and on September 28, 1912, presented the same to the appellee, the mayor of the town, for his signature and approval, and that when he refused to sign the bill he gave as his reason for such refusal that the bill should have been taken and signed during the meeting of the board at the June term, 1912.

Section 80 of the Code provides that any person aggrieved by judgment or decision of the board of a city, town, or village may appeal to the next term of the circuit court of the county, and may embody the facts and decisions in the bill of exceptions, which shall be signed by the person acting as president of the municipal authorities. It appears that the bill of exceptions was not taken and signed during the term of the municipal board at which the order complained of was passed, and it does not appear that the time for preparing and perfecting the bill was extended into the vacation following the term. The mayor's reason for his refusal to sign the bill is

sufficient. The demurrer was properly sustained. *McGee* v. *Jones*, 63 Miss. 453.

The fact that appellant did not have any notice that a motion relative to the matter would be presented at the meeting and did not have notice of the passage of the order would not be sufficient to authorize the mayor to sign, several months after the adjournment, the bill of exceptions which was not prepared and presented to him during the term. In the case of *McGee* v. *Beall*, 63 Miss. 455, referred to by appellant, the bill of exceptions was prepared and tendered to the president of the board of supervisors during the term at which the order objected to was entered. The president failed to sign the bill before adjournment of the board, and the court held that the appellant in that case would not be permitted to suffer by reason of the president's neglect to promptly sign the bill. It will be seen that the decision in *McGee* v. *Beall* will not avail appellant in this consideration.

Affirmed.

WALDROP & THOMAS *v.* O. B. CRITTENDED & COMPANY.

[66 South. 644.]

TRIAL. *Conflicting evidence. Question for jury.*

Where on the trial of a case, the evidence is conflicting, a peremptory instruction should not be given.

APPEAL from the circuit court of Bolivar county.

HON. CUTRER, Special Judge.

Suit by O. B. Crittended & Company against Waldrop and Thomas. From a judgment for plaintiff, defendants appeal.

The facts are fully stated in the opinion of the court.

Jas. R. McDowell and *W. G. Hardee,* for appellant.

Sommerville & Sommerville, for appellee.

SMITH, C. J., delivered the opinion of the court.

Appellees are cotton factors doing business in the city of Greenville. They instituted this suit in the court below to recover of appellants a balance of account claimed to be due them, one of the item of which is commissions for the sale of a lot of cotton sold by them for appellants. At the close of the testimony the court instructed the jury to find for appellees the amount sued for, and there was a verdict and judgment accordingly. When the cotton was placed with appellees for sale, appellants borrowed from them the sum of eight thousand dollars. According to appellees, it is the custom of cotton factors in Greenville and vicinity to charge a commission of two and one-half per cent. for selling cotton, and that such commission is always charged when advances are made by the factors to the owner of the cotton, and that this cotton was placed with appellees to be sold and commissions charged in accordance with this custom. According to the evidence introduced on behalf of appellant, however, there was a special contract with reference to commissions to be charged, which was that appellees were to receive fifty cents a bale for selling the short stapel cotton and one dollar per bale for selling the long staple cotton. The eight thousand dollars was borrowed from appellees at the time appellants claim that this agreement was made, and nothing whatever was said to them indicating that this fact would result in an increase in commissions to be charged. This conflict in the testimony must have been overlooked in the court below, otherwise the peremptory instruction would not have been given.

Reversed and remanded.

LOUISVILLE & N. R. CO. *v.* STATE.

[65 South. 881.]

1. APPEAL AND ERROR. *Law of the case. Federal question.*

The law of the case rule has no application in cases of a second appeal to the supreme court of the state, where the question involved arises under the Constitution and laws of the United States; the supreme court of the United States having final jurisdiction, and the state court being bound by and required to follow its decisions in such matters.

2. COMMERCE. *Power of state. Restriction on right to remove cause to federal court.*

While a state can for any reason it sees proper exclude from doing business within its boundaries, a foreign corporation authorized only to do a purely interstate business, yet its power over a corporation which is an instrument of interstate commerce such as a foreign railroad corporation engaged both in interstate and intrastate business, is subject to limitations, one of which is that it cannot deprive it of a right guaranteed by the Federal Constitution, as the right to remove a suit from a state court to a federal court; and therefore it cannot as was attempted by Laws 1908, chapter 122, penalize it, by prohibiting it from doing an intrastate business, merely because it had exercised the right of removal.

APPEAL from the chancery court of Harrison county.

HON. J. M. STEVENS, Chancellor.

Suit by the state against the Louisville and Nashville Railroad Company. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Green & Green and *Gregory L. Smith,* for appellant.

W. D. Anderson, Ross A. Collins and *Geo. H. Ethridge,* for appellee.

SMITH, C. J., delivered the opinion of the court.

This is the third appearance of this cause in this court, the opinions rendered on the former appeals being re-

ported in 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150, where a full statement of the facts and of the issues involved will be found set out, and in 61 So. 425. The decree rendered in the court below was in accordance with the opinions heretofore rendered.

Appellant's principal contention on this appeal is that the right of a foreign interstate railway carrier doing business in the state of Mississippi to remove to a federal court a suit brought against it in a Mississippi court is unconstitutionally abridged by the provisions of the statute under which the state is seeking to exclude it from further engaging in local business.

Appellee contends, appellant practically admits, and we will assume, that this contention was included in the contentions heretofore presented to this court and was decided adversely to appellant. Ordinarily, the opinions heretofore rendered would constitute the law of the case, and the matters therein decided would not be again examined by us; but the law of the case rule has no application here for the reason that the right claimed by appellant is one which arises under the Constitution and laws of the United States, and with reference to all such questions this court is not one of final jurisdiction, but is simply an intermediate appellate court, from whose decision an appeal lies to the supreme court of the United States, the decisions of which court, in all such matters, are binding upon and must be followed by us. Black's Law of Judicial Precedents, p. 269.

When the case was last before us, we upheld the validity of the statute on the ground that under the cases of *Bank of Augusta* v. *Earle,* 13 Pet. 519, 10 L. Ed. 274; *Paul* v. *Virginia,* 8 Wall. 168, 19 L. Ed. 357; *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535, 24 L. Ed. 148; *Waters Pierce Oil Co.* v. *Texas,* 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 647; *Security Mutual Insurance Co.* v. *Prewitt,* 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317—a state has the power to exclude a foreign corpora-

tion from doing business within its borders for any reason it may deem proper whether that reason be good or bad, even though an unlawful motive might have impelled the state to exercise this lawful power.

Since then, however, the supreme court of the United States, in *Harrison* v. *St. Louis & San Francisco Railroad Co.,* 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed.——, has held that while this may be true in so far as a corporation which is so organized that it has no authority to do anything but a purely intrastate business is concerned, a state has no such power over a corporation which is an instrumentality of interstate commerce, such as a railroad corporation engaged in operating a railroad doing both interstate and intrastate business; that the state's power over such a corporation is subject to certain limitations, one of which limitations is that it cannot deprive such a corporation of a right guaranteed to it by the Federal Constitution, and since that Constitution guarantees to such a corporation the right, under certain circumstances, to remove a case from a state to a Federal court, a state is without power to penalize it by prohibiting it from doing an intrastate business merely because it has exercised that right. This much is clear from the opinion rendered in that case and is sufficient to dispose of the one now under consideration.

The opinion in the Harrison case can best be understood when viewed in the light of the cases cited therein, particularly *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, and the concurring opinion of Chief Justice WHITE in *Pullman Co.* v. *Kansas,* 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378. In these two cases, and also in the *Herndon case,* 224 U. S. 496, 32 Sup. Ct. 550, 56 L. Ed. 857, the states were only attempting to exclude the offending corporations from doing a business which was wholly intrastate.

It becomes necessary therefore for us to recede from our former holding and to declare the statute in ques-

tion invalid. The judgment of the court below must therefore be reversed and the bill dismissed.

Reversed and bill dismissed.

RILEY *v.* STATE.

[65 South. 882-127.]

CRIMINAL LAW. *Admissions. Acquiescence by silence.*

Where accused was imprisoned with his wife, who had been convicted of murder, evidence that his wife had been overheard to say to him that he had forced her to kill deceased and to take the responsibility, was not admissible on the ground that he did not deny her statement, but was silent, since under the circumstances of this case a normal man would probably have remained silent.

APPEAL from the circuit court of Wayne county.

HON. J. L. BUCKLEY, Judge.

Jim Baley was convicted of murder, and appeals. This was heard on suggestion of error.

The facts are fully stated in the opinion of the court.

S. M. Johnston and *J. A. Anderson,* for appellant.

Here we have the wife accusing the husband of the killing of the deceased. And from the statement of the wife we see that it is not her intention to accuse the appellant of the crime but that she is deploring the fact "that she must go to the penitentiary" while the appellant lays around here with another woman." The minds of both parties are evidently filled with thoughts of the "other woman," and while in a fit of jealousy the wife accused her husband of the crime. Is the declaration then of an excited person, accusing another of a crime, of such potency, that it calls for a reply from

the accused. Our idea of an accusation in order to merit a reply, must be made by a cool, serene, calm and deliberate mind, whereby the person accused may understand from the manner of the statement he is expected to make a reply. In *Massachusetts* v. *Kenney,* 12 Metcalf 235, 46 American Decisions 672, the court says: "Where two watchmen arrested A and carried him to prison for robbing B, who also came, saying: 'That man has stolen my money,' and A was seen by C to hide a bag on the shelf in the prison as he was about to be locked up, and C immediately got the bag of money when B said: 'it was his bag and all the money he had,' to all of which A made no reply, on an indictment against him for stealing the money, it was held that the declarations of B were not evidence of A's admissions, either of the stealing or that the money was B's. The court further says that they were made by an excited, complaining party to such officers, who were just putting him into confinement." Upon these statements of facts a new trial was granted. Nor was the defendant at bar in the calm tenor of his mind. Confusion upon confusion was hurled into his brain; worry after worry weighed upon his mind. His wife had just been convicted of murder, he himself was under indictment for the same crime, his wife was accusing him of loving another woman, and is it a wonder that he, himself, should come out of his lethargy, and make a reply where the controversy was about the woman. "Do your honors think that under the circumstances, your appellant was in duty bound to make a reply, if so, you must pardon something to the frailties of mankind." We don't think that these facts meet the requirements of number one and two.

Your honors must remember that admissions by acquiescence must be weighed carefully for "trifles light as air, sometime become confirmations strong as proofs of holy writ." Ofttimes the shrewd criminal's acts are

in harmony with innocence, while a good, innocent man, will blush, and sometimes startle under the torture of false accusation. Even confessions actually made by the defendant are looked upon with the closest scrutiny by all courts, and if there is anything suspicious about the looks of them they are not admitted as evidence. Surely then your honors are not going to admit as evidence the mere shadows of confession, only skeletons of evidence.

In 123 Mass. 440, the court held that where an accomplice of the defendant, accused the defendant, to an officer, of giving him a stolen watch, the accused was not called upon to reply to or contradict any statements made in his hearing. *Commonwealth* v. *McDermott,* 25 American Reports 120, 123 Mass. 440.

Your honors readily see that certain circumstances do not compel the accused to make a reply. In both of the above cases the accused was in custody of the law. Unless the circumstances are so plain that he could answer, by the force of the accusation and by his environment, then we contend that he had a perfect right to stand mute.

Your defendant had already been accused of crime by an indictment, and by an affidavit in the lower court. Is it to be said that he must, at every time the accusation is thrown into his face, make denial after denial? Surely the defendant was not called upon to deny this charge.

For the foregoing reason, attorneys for the appellant think that your honors should reverse appellant's case and grant unto him a new trial.

Geo. H. Ethridge, for appellee.

Counsel for the appellant have objected to the effect of the statements made by Mrs. Riley to Mr. Riley as being incompetent on the theory that the probative effect of such evidence flows from the statement of the wife and inasmuch as she was incompetent to testify against

the husband directly, she could not testify against him indirectly. Counsel for appellant are mistaken in assuming that the probative effect of this statement arises from the statement made by the wife but it arises from the admission of the husband. The true theory of the law on this subject is that the statement made in the presence of such a person, charging him with crime, and which he would ordinarily feel impelled to deny, is a tacit admission of the truthfulness of the statement. The probative effect of such evidence is derived from the failure of the party to deny. It is treated as an admission coming from the party and such being the case it doesn't matter who addresses the charge to him or makes the charge which he is called upon to deny or which he would naturally deny if the statement were untrue. The competency of the witness making the statement which he has not denied has nothing to do with the matter. At common law, quite a number of parties were incompetent to testify, but I think it would not be assumed that a statement made by such party in the presence of another person which such other person failed to deny would be any less effective when made by an incompetent witness than it would be if the witness were competent.

At common law, an infidel or an atheist was absolutely incompetent to testify. It would not prevent a party being called upon to respond to an accusation made him in any such case. Under the laws of this state, at present, a person who has been convicted of the crime of perjury or subornation of perjury is absolutely disqualified from testifying in court, still they might make a statement in the presence of another party and the failure of such party to deny it would have the same probative effect as if the charge was made by a competent witness.

The question of evidence in this case does not arise on the ground of the incompetency of the wife testifying

against her husband. If the conversation was privileged at all, it was on the theory of privileged communications or conversations between husband and wife growing out of the marriage relation and the public policy which ordinarily protects conversations between husband and wife from being given in evidence against either party.

It is stated in 6 Cyc. of Evidence, 897, clause "c" "Basis of Rule" as follows: "The basis of this rule excluding communications or conversations between husband and wife during coverture, is public policy and is wholly independent of any question of interest or identity.

And this same public policy is very generally recognized by the statutes, at page 906 of 6 Ency. of Evidence, under the heading of "Conversations in Presence or Hearing of Third Person," it is said: "Conversations between husband and wife, or admissions by one to the other, in the presence of the third person, are not privileged, and can be testified to by the hearer. And it has been held that a conversation between husband and wife might be testified to by a concealed listener who overheard it. It is held, however, that a wife is not a competent witness to prove what was said in a conversation by another person with her husband, nor to prove any act done in connection with such conversation and which might be explained thereby."

In *Allison* v. *Barrow,* 3 Coldwell, 414, 91 American Dec., 291, it is stated that conversations between husband and wife when made in the presence of a third person do not belong to the class of privileged communications and may be given in evidence against the husband. The force and effect of the admission depend upon the circumstances upon which it is made.

In discussing the question of privileged communications between attorney and client, which are ordinarily privileged, it was held in *Whiting* v. *Barney,* 86 Am. Dec. 385, 80 N. Y. 380, that such communications were not

confidential and privileged when made in the presence of a third person. See also: *Gaynon* v. *People,* 127 Ill. 507; 21 N. E. 525; *Fay* v. *Guynon,* 131 Mass. 31; *State* v. Dray, 55 Kan. 135; 39 Pa. 1050; *Phoenix F. & M. Co.* v. *Shoemaker,* 95 Tenn. 72, 31 S. W. 270. And this is true even where the conversation was overheard by a concealed listener. *Rex* v. *Simmons,* 6 Car. & P. 540; 25 Ecl. 565; *Leon* v. *Prowdy,* 154 Mass. 488, 28 N. E. 908; *Commonwealth* v. *Griffin,* 110 Mass. 181; *People* v. *Hayes,* 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572; 23 L. R. A. 830; *Wheeler* v. *Campbell,* 68 Vt. 98; 34 Atlantic 35; *State* v. *Center,* 35 Vt. 378; *Knight* v. *State,* 114 Ga. 48, 39 S. E. 928.

In 1 Encyclopedia of Evidence, under the head of "Admissions," page 367, in subdivision, "From Silence and Acquiescences," it is said: "So the silence of a party, when a statement is made in his presence, against his interest, and is heard and understood by him, and is made in such way as to call upon him to deny it, if true, and the facts are within his knowledge, and the statement is made under such circumstances as naturally to call for a reply, amounts to an admission of the truth of the statement made, and may be sufficient to establish the fact as against him." *State* v. *Farish,* 23 Miss. 483, and other authorities cited in note 27 to the above text.

COOK, J., delievered the opinion of the court.

Appellant was convicted of the murder of Julius Bee and appeals. His wife was also convicted of the same crime before appellant was tried. Some weeks since this case was affirmed without an opinion. The case is here now on suggestion of error.

After the conviction of Mrs. Riley, she and her husband, appellant, were confined in jail together with a number of other persons charged with crime. Over the objections of appellant, the trial court permitted several of the inmates of the jail to testify that they

overheard a conversation between appellant and his wife. We gather from the record that the alleged conversation occurred some time late in the night. The conversation awakened several of the prisoners, and it is evident that neither appellant nor his wife knew that they had eavesdroppers. The witnesses for the state practically agreed upon what was said in this conversation, and it amounts to about this: The wife was bemoaning her fate, and said to appellant that he had forced her to take the entire responsibility, when he knew that he had made her kill Julius Bee. The only reply made by appellant to this charge was to say:

"Hush, Bessie, if you go to the penitentiary, you won't be gone over six months before you get a pardon. If they convict me, they will hang me."

The conversation as related by the state's witnesses varied somewhat, but what has been stated is substantially the evidence of all.

It is contended by appellant that, inasmuch as the wife could not have been introduced to testify that she had charged defendant with the crime and he did not deny the charge, it follows that others could not be introduced to testify to this charge, citing *Pearson* v. *State,* 97 Miss. 841, 53 So. 689.

Again, it is insisted that defendant was not called upon to deny what his wife said under the circumstances.

The rule and the reasons for admitting testimony of this kind is clearly stated in 1 Encyclopedia of Evidence, p. 367, viz.:

"So the silence of a party when a statement is made in his presence, against his interest, and is heard and understood by him, and it made in such way to call upon him to deny it, if untrue, and the facts are within his knowledge, and the statement is made under such circumstances as naturally to call for a reply, amounts to an admission of the truth of the statement made, and may be sufficient to establish the fact as against him."

We think appellant misconstrues *Pearson* v. *State, supra.* In that case a witness for the state was permitted to testify to conversation between the defendant and his wife in which the wife charged the husband with the crime. It was not claimed that the wife knew anything about the facts, but simply based her charges upon what some other person had told her.

We do not understand that the court in the *Pearson case* condemned the evidence because of the incompetency of the wife to testify against her husband, but for the reason that the statement made by her was purely hearsay.

All of the evidence here in question shows that the defendant was sympathizing with his wife and was trying to comfort her with the assurance that she would soon be released. She was naturally hysterical and much depressed. Under these circumstances, was the defendant called upon to repudiate what his wife said to him? Was the charge "made in such a way as to call upon him to deny it"?

It is not always conducive to domestic peace for a husband to contradict the statements of his wife, and ordinarily the wise husband attempts to soothe and placate his irate spouse, rather than to question her statements, however wide of the truth they may be. A few husbands are brave or foolhardy, and at all hazards risk the consequences; but the law does not fix rules for the guidance of the superman, but all rules are adopted for the average. Of course, a judge far away from "the firing line" incurs no immediate danger by lining up with the superman, but we who are fashioned in the average mold shrink from even that form of bravado. Speaking for the average man, we are of opinion that appellant was not called upon to deny the statement of his wife, made under the circumstances surrounding them at the time. His failure to deny, dispute, or hedge meets with our idea of what a normally prudent and

sensible man would naturally have done, and therefore the evidence had no probative value, but was probably very damaging to him with the jury.

The suggestion of error is sustained.

Reversed and remanded.

REED, J. (dissenting).

I cannot assent in the reversal of this case. In my view appellant was accorded a fair trial and the verdict of guilty is supported by the evidence.

The case is reversed because the trial court erred in admitting the testimony, given by several witnesses, of a conversation which they overheard between appellant and his wife while both were confined in the county jail. In that conversation the wife charged appellant with committing the crime and he made no denial of it. It is held in the majority opinion that appellant "was not called upon to deny what his wife said under the circumstances," and that the evidence had no probative value.

Admissions may be implied from the mere silence of a party. The following statement of the rule is contained in Jones on Evidence, vol. 2, par. 289:

"The rule is well settled that conversations between parties to a controversy, in which one makes a statement of fact of which both have personal knowledge, and which naturally calls for a denial by the other if the statement is untrue, are competent against the silent party, as admissions, by acquiescence, of the truth of the statement. The weight of the admission varies with the circumstances of the case, and the strength of the probability that the statement, if untrue, would have evoked a denial, and is always for the jury, guided by a proper caution of the court as to the theory upon which such conversations are admitted."

The law on this subject is further stated in Ruling Case Law, vol. 1, par. 15, as follows:

"If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes no reply, it may be a tacit admission of the fact stated; depending upon whether he hears and understands the statement, and comprehends its bearing, whether the truth of the facts embraced in the statement is within his own knowledge, whether the circumstances are such as to afford him an opportunity to act and speak freely, and whether the statement is made under such circumstances and by such persons as naturally to call for a reply if he did not intend to admit it."

I make this further quotation from the same paragraph of this very helpful digest and compendium of the law:

"It may be stated as a general rule that statements made to or in the presence of a person, accusing him of commission of or complicity in a crime, are, when not denied, admissible, in evidence against him as warranting an inference of the truth of the statements."

It has been decided that a statement calling for a denial, made in the presence of one accused of a crime by his wife, who is herself not a competent witness against him, is admissible in evidence against him. *Dunham* v. *State,* 8 Ga. App. 668, 70 S. E. 111.

In the case of *Commonwealth* v. *Griffin,* 110 Mass. 181, defendant was indicted for manslaughter, and the testimony of two officers who were concealed for the purpose of listening was offered to prove a conversation between the defendant and his wife, while in jail, concerning the homicide. They did not know that the witnesses or any persons were in hearing of them. The court held that this testimony was admissible.

It is clear that the testimony of the conversation between appellant and his wife, in which he failed to make denial when he was charged with the homicide, is admissible unless there is some circumstance or reason to relieve him of denying the charge. I do not see any

such circumstances or reason in the proof in this case. Certainly appellant heard and understood the charge made against him. The statement made by his wife was of something within his knowledge. It was not a statement made by a stranger whom he was not called on to notice. The testimony does not show that he was restrained by fear of his wife at the time. He certainly then knew his rights. It can hardly be said he then believed that his security, in so far as his prosecution for the offense was concerned, would be best promoted by his silence. I think that the statement made by the wife was under such circumstances as to call for a reply.

I note with much interest the statement in the majority opinion that the wise husband will refrain from contradicting his wife and endeavor to soothe and placate her ruffled temper, rather than to question her words, even though wide of the truth, and that few are so brave or so foolhardy as to chance the consequence of the contrary conduct. Such a husband is classed in the opinion as the "average man," and the writer tells us that the majority of this court who are deciding this case are fashioned in the same mold; that they are unlike the judge who stands afar from the "firing line," thinking he is in no immediate danger, and dares to say that a defendant, when charged with the unlawful taking of a human life by his wife, should deny the charge. I will not dispute what is so earnestly declared to be the proper course for a wise husband, in his temperate dealings with his irate spouse. Undoubtedly discreet conduct and soft words are advisable in such a situation. I bow with respectful deference to the experience and good judgment of the majority as to all these matters conjugal.

However, I do not think that this wise policy, which my brethren advise the good husband to follow, should be permitted to interfere with, and in truth interrupt completely, the operation of the rule touching the admissibility of the overheard conversation in this case.

The testimony of the witnesses who overheard the conversation shows a very clear statement by the wife charging appellant with murder. One witness testified that she said:

"You know you killed that man and made me take it on myself, and if I was to do it over I would tell the people the truth about it, if you broke my neck."

Another witness stated her words as follows:

"Jim, you know you killed that man, there ain't no need of you telling me to hush."

It is also shown by the testimony that the couple were quarreling with each other. So appellant was not keeping silence in all matters during the conversation.

In addition to my view that the charges made by the wife called for a denial, I believe that it was for the jury, "in the light of all the circumstances, to say whether or not the silence or failure to deny amounts to an admission." Jones, on Evidence, par. 289.

Appellant may not have failed to reply to his wife's accusation because of his fear of her, as suggested by the reasoning in the majority opinion. He may not come up to the standard of "the average man" as a husband. It may be that he did not have the good judgment of such husband in deferring to his wife, recognizing her superiority, or, if you please, her majority vote in all matters domestic. Perhaps their manner of life was not conducive of the finer feelings which move the average man to bow obediently to his spouse. This may readily be believed when we notice their living place and surroundings; for it is in evidence that the room of moderate size, in which the murder was committed, contained three beds and was occupied by seven persons, one of whom was a man so drunk as to need the services of a physician.

Appellant may have thought that, as he and his wife were alone and no one in hearing, it was useless to deny what she already knew. Perhaps if he had known that

some one was overhearing the conversation he would have stoutly denied the charge. He was not under duress, unless it can be said he was bound by fear in his mind diseased with the horrid memory of the shedding of human blood.

This couple, in the quiet of the night, alone as they doubtless believed, with the common knowledge of the crime, conversed with each other concerning the guilt. there was probative value in what they said, the degree of which the jury could determine.

STATE v. PONS.

[65 South. 882.]

LICENSES. *Occupation. Statutes. "Oil depot." Code* 1906, *section* 3843.

Under Code 1906, section 3843, imposing a license tax of fifty dollars upon each oil depot and, providing that "each building or tank where oil is stored for delivery shall be deemed a depot, but this provision shall not apply to merchants who retail oil to their customers in the regular course of business," where defendant had or used a room or building erected by an oil company and bearing its sign, in which it stored oil and gasoline which defendant as its agent, retailed therefrom for a commission, accounting to its regular agent, in such case defendant did not maintain an "oil depot" so as to be liable for the tax.

APPEAL from the circuit court of Harrison county.

HON. J. I. BALLENGER, Judge.

Joe Pons was indicted for failure to pay a privilege tax on an oil depot. From a judgment acquitting him, the state appeals.

The facts are fully stated in the opinion of the court.

J. M. Vardaman and *Geo. H. Ethridge,* for the state.

There is no written opinion of the judge in this case, so I cannot tell whether he rendered his opinion holding

appellee not guilty on the ground that the one tax paid by the Standard Oil Company covered both depots, or whether he was of the opinion that if there was a tax due, the Standard Oil Company would have to pay it. I will base my brief on the assumption that the trial court was of the opinion that the one tax paid by the Standard Oil Company would cover both places of business. From a careful comparison of the statement of facts in this case with the section of the code which deals with the subject, I cannot see how, under the usual construction of the words of the code, the two depots could be considered as one.

The words of the code on this question are as follows: "Each building or tank where oil is stored for delivery shall be deemed a depot." The facts in this case show that the Standard Oil Company has a regularly established depot on the L. & N. Railroad, a half mile from the depot of appelee, which depot caters to an entirely different trade from that of appellee. Surely this cannot be considered as one and the same depot. It is true that appellee is agent for the Standard Oil Company and receives a commission of one per cent on all oil and gasoline that he sells, but the mere fact that he works on a commission salary basis instead of on a salary basis would not affect the nature of the depot. He could run an oil depot as well on a commission basis as on a salary. The statute says in plain words that each place where oil is stored for delivery shall be deemed a depot and the facts in this case are identical with the words of the statute. The facts show that oil is stored in "large quantities" in appellee's shop and that he has a certain established trade that he caters to.

In this case the main depot is so situated at Biloxi that they cannot conveniently cater to the trade of the oyster and shrimp boats, etc., it being a half mile from shore. In order that the Standard Oil Company may get all of this trade, a separate and distinct depot is established

out in the Mississippi Sound and a large sign with the words "Standard Oil Company, Gasoline" is placed across the front of the depot, and a separate agent is placed there to look after the interest of the company. Judging from the words of the statute and taking the construction placed upon them by the courts, it was the intention of the legislature to levy a privilege tax on each depot or place where oil was stored for delivery, and I submit that the facts show that there were two depots. This case is analagous to a case where a merchant had several retail stores in the same town. The same person owns both stores but no one would doubt for a minute that he would be liable for a separate privilege tax on each store. It is the store or "stand" that is protected by the law, therefore the store should pay the tax to secure this protection. It is a well-known fact that two stores require more protection from the law than one store does; then why should not two stores pay a greater tax than one store.

In the case of *Insurance Agency* v. *Code,* 87 Miss. 637, the court held that it was right and proper that an insurance agency should be taxed, and that an additional tax on each insurance agent would not constitute double taxation.

In the case of *Mitchell* v. *Meridian,* 67 Miss. 644, the leading case on privilege laws in Mississippi, the court had up for consideration a case on all fours with the case at bar. In that case the Singer Machine Company had a "depot" in the city of Meridian to which it shipped sewing machines to be distributed among the agents of that territory. Mitchell had to distribute machines as agents and collect accounts, but he sold no machines. The general agency of the company was in Mobile and the Mobile agent was a frequent visitor to Meridian in the interest of the business. Mitchell paid a privilege tax to the city of Meridian as "sewing machine agent." Mitchell refused to pay the city privilege tax on "each agency for sewing machines" and was convicted and fined. Upon

appeal to the supreme court the case was affirmed. In the course of the opinion, the court, Judge COOPER speaking, said: "The legislature in dealing with the subject of privileges, taxes then in reference to the known and usual course of business, and the burden imposed cannot be evaded by changes in the mere form of transacting the business intended to be taxed, or by parceling out among several, the duties usually pertaining to one." "As a general rule, one who is engaged in two separate and distinct occupations is subject to license-tax on both occupations. So, too, one who conducts the same business at different places, whether the business be wholesale or retail, is liable to a license-tax on the business conducted in each place." 25 Cyc. 626, K. B.; *State* v. *Holmes,* 28 La. Ann. 765, 26 Am. Rep. 110; *Walters* v. *Duke,* La. Ann. 668.

"This rule applies even where one of the places of business is merely a branch establishment, provided the business at the principal and branch establishment is carried on separately." *Murrell* v. *Bokenfohr,* 108 La. Ann. 19, 32 So. 176.

There is an exception in the statute which provides that merchants, who retail oil, etc., in the usual course of their business shall not be subject to this tax, but that exception does not apply to the case at bar. According to the facts in this case, that "oil depot" was run as a separate and distinct business having no connection with the fish business. Granting for the argument that the oil depot was run in the same building as the fish business, by no construction could an oil depot be classed as incident to a fish bsuiness, and the oil depot would be liable to the tax. As to buying and selling cotton seed being a part of a mercantile business, see *Jones* v. *State,* 69 Miss. 406.

Ford & White, for appellee.

We submit that a depot may consist of a single building or a number of buildings. It is the purpose for which

it is used and not the number of buildings that control. A depot does not necessarily mean a single building, but means the entire grounds used by a railroad company for its business purposes with the public at that station. *Pittsburg, Ft. W. & C. R. Co.* v. *Rose,* 24 Ohio St. 219; 3 Words and Phrases, page 2005. (Note.) In this case, the court held that a building on a lot forty rods to the main depot building was a part of the depot building and ground. 41 Cen Dig., Title, Railroad, sec. 171.

The word depot is not necessarily limited to a place provided for the convenience of passengers while waiting for the arrival or departure of trains. It applies also to buildings used for the receipt and storage of freight, which when received, is to be safely held until forwarded by the cars of the company or delivered to the owner or consignee. *Humphreys* v. *McKissock,* 35 Law. Ed. (U. S.), page 475.

Laws imposing privilege taxes are to be construed in favor of the citizen and no occupation is to be taxed unless clearly within the provision of such law. *V. & M. R. R. Co.* v. *State,* 62 Miss. 107. Unless plainly expressing a different purpose, a statute will be construed as intended to levy a single tax upon property, though the words of the law would naturally bear a broader meaning. The courts will, as far as possible without doing violence to the language used, restrain the meaning of a statute apparently authorzing a double taxation. *State* v. *Simmons,* 70 Miss. 485. Code 1906, sec. 3845, imposing a privilege tax on every person doing a plumbing business, does not apply to a plumber working by the day or taking the contracts to be performed by his own labor. The tax is due only from a person, firm or corporation taking contracts to be performed by the labor of other plumbers. The law imposing privilege taxes should be strictly construed, liberty, in its broad sense, implies the right to follow any of the ordinary callings of life without being unduly trammelled. *Willby* v. *State,* 93 Miss. 767.

In this case the Standard Oil Company had a regular or main depot in Biloxi, and for convenience in delivering oil and not for the purpose of getting new customers, it stored oil from its regular depot in a room or warehouse for the purpose of allowing boats to come alongside and take on oil, thus avoiding the trouble and delay which would have resulted had it adopted a system by which it would have had to delivered separately each order made by a boat. We presume that if the Standard Oil Company had stored its oil in different tanks on the same lot, it would not be contended that each separate tank or each separate house would constitute a separate depot.

Suppose, to illustrate, the Standard Oil Company had a depot, with a regular agent in charge, on a lot, along one side of which ran a street, and along the other side of which ran a watercourse, and for convenience in loading wagons, it should have one warehouse on the side next to the highway, and for convenience in loading boats, it should have another on the side next to the watercourse, with a subagent in charge of each, could it be contended that this would constitute three oil depots and subject it to a payment of three privilege taxes? We think not, and we insist that the fact that this warehouse or subdepot was on a separate lot would not change the rule.

COOK, J., delivered the opinion of the court.

Joe Pons, appellee, was indicted for a failure to pay a privilege tax on an alleged "oil depot." By agreement, a jury was waived and the case was tried by the circuit judge upon the following agreed statement of facts:

"The defendant, Joe Pons, uses and operates a pier or wharf in the city of Biloxi, belonging to his mother, which wharf extends out into the Mississippi Sound, to where the water is deep enough for boats to come alongside said pier, at which said wharf the defendant, Joe

Pons, operates a fish house, where he deals in fish and other sea foods; that on another part of said pier the defendant has and uses another room or building, erected by the Standard Oil Company, and not connected with the fish house aforesaid; that at Biloxi a large quantity of gasoline is used by oyster and shrimp boats, and other boats propelled by gasoline motors, and that in last-named room on the wharf of said defendant there is kept and stored oils and gasoline belonging to the Standard Oil Company, which said oils and gasoline are kept primarily for the purpose of supplying boats with gasoline, and said oils are sold by defendant to such boats, and also to passing automobiles and others that may desire to purchase from defendant; that said sales are made by defendant as agent for the Standard Oil Company, for which sales the defendant receives a commission of one per cent of all sales of oils and gasoline, accounting to the regular agent at Biloxi of the Standard Oil Company for all such sales; that on said room or building where said gasoline is stored there is a sign about fifteen feet long, extending along the front of said room or building, on which is printed in large letters 'Standard Oil Company, Gasoline;' that the Standard Oil Company maintains near the Louisville & Nashville Railroad Company's depot in said city a regular oil depot, with a regular agent of said company in charge, and pays a regular license for such oil depot, in which depot large quantities of oil and gasoline are stored and kept, being drawn through pipes from the cars into tanks in said depot; that said depot near the Louisville & Nashville Railroad Company's depot is about one-half mile from said wharf on the beach in charge of the said defendant, Joe Pons, and is inaccessible to boats using gasoline for motor power, and that said Standard Oil Company, through its regular agent at Biloxi, delivers oils and gasoline to its agent, Joe Pons, at the wharf aforesaid, where he sells and delivers it to boats, automobiles, and others applying to

him for the same; that no license is paid by the Standard Oil Company, or Joe Pons, except the license hereinabove mentioned, and that Joe Pons is acting as agent of the Standard Oil Company when selling oil and gasoline at said wharf."

The court entered a judgment finding the defendant not guilty, and the state appealed.

Section 3843 of the Code of 1906, under which the indictment was drawn, reads:

"Oil Depot.—On each oil depot.....$50

"Each building or tank where oil is stored for delivery shall be deemed a depot, but this provision shall not apply to merchants who retail oil to their customers in the regular course of business."

In our opinion, the finding of the judge is correct. Under the facts, appellee's business is not of the kind upon which the tax of fifty dollars was levied. He did not run an oil depot.

Affirmed.

COLLINS v. STATE.

[65 South. 645.]

INTOXICATING LIQUORS. *Offenses. "Keep for sale."*

The two Acts, Code 1906, section 1746, as amended by Acts 1908, chapter 115, making it unlawful to "keep for sale" intoxicating liquors, and Code 1906, section 1797, as amended by laws 1908, chapter 114, making it unlawful "to have in possession" any intoxicating liquors with the intention of selling, create separate and distinct offenses, and proof of possession with intent to sell, without more is not sufficient to support a conviction under the former act; to "keep for sale" meaning to habitually have on hand.

APPEAL from the circuit court of Yazoo county.

HON. W. A. HENRY, Judge.

Clarissa Collins was convicted of keeping intoxicating liquors for sale and appeals.

The facts are fully stated in the opinion of the court.

Holmes & Holmes, for appellant.

Under the statutes of this state the legislature has seen fit to create two separate and distinct offenses as regards the having of liquor for sale. It is one offense to have liquor in one's possession with the intention and for the purpose of selling it, etc., as amended by chapter 114, page 115 of the Laws of 1908, which is as follows: "It shall be unlawful for any person in this state to have in his possession any intoxicating liquors with the intention or for the purpose of selling the same or giving in violation of law. Anyone violating this section shall, upon conviction for each offense, be punished by a fine of not less than ten dollars, nor more than one hundred dollars, or be imprisoned in the county jail not exceeding thirty days, or by both such fine and imprisonment."

It is another offense to "keep for sale, etc.," intoxicating liquors, as prescribed in section 1746, of the Code of 1906, as amended by chapter 115, of the Laws of 1908, which is as follows: "If any person shall sell, or barter or give away to induce trade, any vinous liquors, such person, shall, on conviction, be fined not less than fifty dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than one week, or more than three months, or both, but in no case of conviction, of any person, of any offense, under this section committed after a conviction and punishment for a former offense hereunder, shall the punishment be less than a fine of one hundred dollars, nor more than provided in this section, or imprisonment in the county jail for not less than sixty days, nor more than six months, or both, in the discretion of the court."

It might be true that one who is guilty under the latter statute would also be guilty under the former statute,

but it is not necessarily true at all that because one is guilty under the former statute, he is also guilty under the latter. One might be guilty of having in one instance, liquor in his possession, for sale, but he would not necessarily be guilty of the offense of keeping liquor for sale. For instance, A gives B a pint of liquor and request that he go out and endeavor to sell the same. B consents to do so, and takes possession of the pint of liquor for this purpose. Before he finds a purchaser, however, he is intercepted by the officers, and the liquor taken from him. On these facts B might be convicted of having liquor taken from him; again, he might be convicted of having liquor in his possession with the intention of selling it, but the facts would not be sufficient to sustain a charge of "keeping" liquor for sale. The two offenses are separate and distinct, and the legislature, in its commendable endeavor to destroy the liquor traffic, no doubt had in mind the distinction between the two offenses when it enacted these statutes. One was regarded by the legislature as a graver offense than the other, and accordingly a graver penalty was fixed for the offense of "keeping" liquor for sale. It can be readily observed that less proof would be required to convict on a charge for unlawfully having in one's possession than would be required on a charge for unlawfully keeping liquor for sale. To "keep for sale" implies more than the mere having in possession. The Century Dictionary, among the definitions of keep, gives the following: "To have habitually in attendance or use; to have habitually in stock or for sale; to maintain habitually." "Keep" involves the idea of continuity of habit. *Easley Town Counsel* v. *Pegg* (S. C.), 41 S. E. 18, *et seq.; State Insurance Co. of Nashville* v. *Hughes,* 78 Tenn. (10 Lea), 461, 469.

With this distinction in mind, we respectfully direct the court's attention to the one instruction granted to the state, which is as follows, to wit: "The court instructs the jury for the state that if you believe from the evi-

dence beyond a reasonable doubt that the defendant, Clarissa Collins, had beer in her possession for sale at the time of the raids upon her house by policemen Lynch, Goodwin and Underwood, then it is your sworn duty to find the defendant as charged."

It will be readily noted that this instruction was predicated on a prosecution for the violation of section 1797, *supra,* which makes it unlawful to have intoxicating liquors in possession, etc. The appellant was not being tried for this offense, which requires less proof to convict. She was being tried for the offense of keeping liquors for sale, which requires a much greater degree of proof. The instruction confines the issue to the one occasion when Goodin, Lynch and Underwood made the raid. This was August 6th, as shown by the proof. Under the instruction the jury were justified in convicting if they believed that appellant, on this particular occasion, had liquor in her possession for sale, even though they may not have believed that she kept liquors for sale as charged in the indictment. It was just as if the trial judge had told this jury: "There are two offenses under the laws of the state of Mississippi. One is to unlawfully have intoxicating liquors in your possession, etc.; the other is to keep for sale liquors, etc. This defendant is being tried for keeping liquors for sale. But if you believe she had in her possession liquors for sale on the date in question, it is your sworn duty to convict, even though you do not believe she is guilty of the offense of keeping liquors for sale.

Appellant was not being tried on the offense upon which this instruction was predicated. The jury received absolutely no instruction on the charge for which she was tried. The jury might have believed that appellant had liquor in her possession for sale on August the 6th, but they might have believed that she was guilty of the graver offense of keeping liquor for sale. The offense on which the jury were instructed required less proof to convict

than the offense on which appellant was being tried, and the jury were authorzied to convict, even though they may not have thought the proof sufficient for the graver offense. The instruction was fatally erroneous, and because it was granted, this case should be reversed. The case must be reversed unless this court hold that there is absolutely no distinction between the two statutes in question, and that the legislature, by the enactment of these two statutes, did not intend to create two separate and distinct offenses.

In this connection it might be well to observe that at the time of the enactment by the legislature of section 1797, *supra,* the other section, to-wit, section 1746, *supra,* was in force and effect, and both sections have since remained in force and effect.

Ross A. Collins, for appellee.

The third contention of counsel for the appellant is without any merit whatever. It is clear that the appellant is charged with keeping for sale intoxicating liquors and that the indictment is based upon section 1746 of the Code of 1906, as amended by chapter 115, of the Laws of 1908, which makes it unlawful to keep for sale intoxicating liquors. The instruction for the state charges the jury that if they believe from the evidence, beyond a reasonable doubt, that this appellant "had beer in her premises" for sale at the time of the raid, that they should find her guilty. It is impossible to see how the phrase "had in her premises for sale" could have been construed by the jury in any other light than that she kept beer for sale. While the language is not identically the same the meaning is practically the same, for if the appellant had beer in her premises for sale she was surely keeping it for sale. This court has held in the recent case of *Jackson* v. *State,* 65 So. 123, advanced sheet of June 13, 1914, that proof of possession without proof evidencing the purpose of selling is not sufficient to support a conviction.

In this case, however, there is not only proof of the possession, but the testimony shows, that there were two white men at the house of the appellant early one morning, one of them being drunk; that there were cold bottles of beer in the house, and that the appellant made the following statements to the Mexican and negro: "You have paid for this one, who is going to pay for the other one?" Also the testimony shows that she cursed them and told them if they did not want to pay for the beer to get out of her house. This conversation had the full effect of a confession on the part of the appellant, that she had sold beer and that it was her intention and purpose to sell beer.

I respectfully submit that the case should be affirmed.

SMITH, C. J., delivered the opinion of the court.

The indictment upon which appellant was convicted charged that she "did . . . keep for sale . . . intoxicating liquors." There was a verdict of "guilty as charged," and appellant was fined the sum of two hundred and fifty dollars and sentenced to imprisonment in the county jail for a period of ninety days. The evidence disclosed that her residence had been raided on several occasions, months apart, by the police; intoxicating liquor being found there on some of these occasions and not on others.

The only instruction granted at the request of the state was as follows:

"The court instructs the jury for the state that, if you believe from the evidence beyond a reasonable doubt that the defendant, Clarissa Collins, had beer in her possession for sale at the time of the raid upon her house by policemen Lynch, Goodin, and Underwood, then it is your sworn duty to find the defendant guilty as charged."

Section 1746 of the Code of 1906, as amended by chapter 115 of the Acts of 1908 and by chapter 214 of the Acts of 1912, makes it unlawful to "keep for sale . . .

intoxicating liquors," and provides that any person so doing shall, on conviction, be punished "by a fine of not less than fifty dollars nor more than five hundred dollars, or to be imprisoned in the county jail not less than one week nor more than three months, or both, for the first conviction for an offense committed after the passage of this act," and then for an increased punishment upon conviction for a second and third offense. Section 1797 of the Code of 1906, as amended by chapter 114 of the Laws of 1908, provides that:

"It shall be unlawful for any person in this state to have in his possession any intoxicating liquors with the intention or for the purpose of selling the same . . . in violation of law."

And:

"Any one violating this section shall, upon conviction for each offense, be punished by a fine not less than ten dollars nor more than one hundred dollars, or be imprisoned in the county jail not exceeding thirty days or by both such fine and imprisonment."

These two sections appear in the same Code and, when re-enacted in 1908, were both approved on the same day. It seems clear, therefore, that the legislature intended by them to create separate and distinct offenses and not to repeal one of them by enacting the other. To say that a person keeps an article for sale seems to involve the idea that he does so habitually; one of the definitions of the word "keep" being "to have habitually in stock or for sale." Century Dictionary, vol. 5. The illustration there given of the use of this word in this sense is taken from Hawthorne's "House of the Seven Gables," and is as follows:

"A . . . house wife of the neighborhood burst breathless into the shop, fiercely demanding yeast; . . . the poor gentlewoman with her cold shyness of manner, gave her hot customer to understand that she did not *keep* the article."

It may be that the legislature had this definition of the word "keep" in mind in framing these two statutes. At all events they have attached one punishment to the keeping of intoxicating liquor for sale and another to merely having such liquor "in possession" for the purpose of sale. Under the latter section, as illustrated by counsel, if A. gives to B. a pint of whisky with the request that he sell it, and B. is arrested before effecting a sale thereof, he is guilty of having intoxicating liquor in his possession with the intention of selling it, but not of keeping it for sale.

It seems, therefore, that under these statute proof of the possession of intoxicating liquor with intent to sell it without more is not sufficient to support a conviction for keeping such liquor for sale. In the case at bar the jury might have believed that, at the time her house was raided on the occasion in question, appellant then had intoxicating liquor in her possession with the intention of selling it, but that she did not keep it for sale. The instruction complained of should therefore not have been granted, and for that reason the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

WESTERN UNION TEL. CO. v. LOUISVILLE & N. R. CO.

[65 South. 650.]

1. EMINENT DOMAIN. *Statutory proceedings. Compliance. Construction of statutes. Code* 1906, *section* 1006.

In eminent domain proceedings every essential prerequisite to the jurisdiction called for by the statute must be strictly complied with, and this must affirmatively appear on the face of the proceeding, in order to give them validity, but a strict compliance with the statute does not necessarily mean a literal and exact compliance. A substantial compliance will suffice.

2. EMINENT DOMAIN. *Statutory proceeding. Compliance.*
Under Code 1906, section 1856, providing that the application to condemn land under the right of eminent domain, shall be presented to the clerk of the circuit court of the county, who shall indorse thereon his appointment of a competent justice of the peace of the county to constitute, with a jury, a special court of eminent domain, the essential requirements is that the justice of the peace shall be appointed in writing and the indorsement thereof upon the application is a mere detail to provide for the more effectual preservation of the evidence of the appointment, and failure to do so is a mere irregularity, not reviewable in a suit in equity to restrain the taking of the property awarded in the proceedings.

3. EMINENT DOMAIN. *Statutory proceedings. Construction of statute.*
A deputy circuit court clerk may appoint a justice of the peace to constitute, with a jury, a special court of eminent domain, as provided by section 1856, Code 1906, since under the power conferred by Code 1906, section 1006, a deputy clerk is authorized to perform all the acts and duties which their principals may lawfully do, and this includes acts done under special authority.

4. EMINENT DOMAIN. *Right to exercise. Telegraph companies.*
While the act of congress passed July 24, 1866 (Act July 24, 1966, chapter 230, 14 Stat. 221), contains no provision conferring upon telegraph companies the right to obtain by eminent domain proceeding a right of way along the line of a railroad company, yet the state has the power to confer such right and section 929, Code 1906, conferring the right of eminent domain upon telegraph companies is a valid exercise of such power.

5. EMINENT DOMAIN. *Judgment. Suit in equity.*
A suit by a railroad company to restrain a telegraph company which has condemned a right of way for a telegraph line from taking possession of the right of way or erecting wires thereon is not maintainable on the theory that the telegraph company may not, under the judgment, take any part of the right of way to maintain an existing line, and should the telegraph company seek to use the judgment for an existing, instead of a new line, its right to do so may then be determined in a proceeding brought for that purpose.

6. APPEAL AND ERROR. *Rendering final judgment.*
The court on appeal from an order refusing to dissolve a temporary injunction for want of equity on the face of the bill, cannot on reversing the order dismiss the bill because the only final judg-

ment which the supreme court can render on reversal is such as should have been rendered in the court below, and such court on motion to dissolve was without authority to dismiss the bill.

APPEAL from the chancery court of Jackson county.

HON. J. M. STEVENS, Chancellor.

Suit by the Louisville & Nashville Railroad Company against the Western Union Telegraph Company. From an order denying a motion to dissolve an injunction, defeandant appeals.

The facts are fully stated in the opinion of the court.

Harris & Potter, for appellant.

The sole purpose of this bill is to have the judgments of the eminent domain court declared void for the reasons set forth in said bill, and does not raise any question of fact, and therefore this court will determine whether, as a matter of law, the complainant is entitled to an injunction in this proceeding, the sole purpose of the proceeding being to exclude the telegraph company entirely from any use of the right of way by perpetual injunction.

We will now consider the objections to the judgment, set up in the bill in the order in which we have presented them. First, as to the failure of the clerk to endorse his appointment of the justice of the peace upon the application. It will be borne in mind that it is shown by the bill that the appointment of the justice of the peace was made in writing and filed with the application. In order to fully appreciate the force of this objection, it would be well to consider the statute, chapter 43, of the Code of 1906, under which the proceedings were instituted, and the purposes for which the eminent domain court is constituted and the scope of its power and authority. It is perfectly manifest from the most casual reading of the statute that it was the purpose of the legislature to divest the proceedings as far as possible of all mere technical and formal matters relating to the procedure.

Vinegar Bend Lumber Co. v. *Oak Grove, etc., Railroad Co.*, 89 Miss. 84.

Even in eminent domain, statutes which are not expressly to be liberally construed in matters of form and procedure, as our statute, is, it is held that a substantial compliance with the statute is all that is required. See Lewis on Eminent Domain (3d Ed.), 1077; 24 Wendell, 367; 45 Hun, 310.

Second, the second objection to the proceedings, is equally without merit. It is urged that the letter of the statute required the application to be presented to the clerk of the circuit court of the county, and that the clerk shall issue the writ, etc., and because in two of the cases the writs, etc., being issued by the deputy clerks, were void and vitiated the whole proceeding. Section 1006, Code of 1906, provides for the appointment of deputy clerks in the supreme, chancery and circuit courts, "who shall take the oath of office, and who shall, thereupon, have the power to do and perform all of the acts and duties which their principals may do and perform."

Third, the third point is that the telegraph company did not have the power or authority to condemn the railroad right of way because it was property already devoted to the public use. We submit that the right of the telegraph company to condemn the rights of way of railroad companies in the state of Mississippi is conclusively settled in the case of *Cumberland Tel. & Tel. Co.* v. *Y. & M. V. R. R. Co.*, 90 Miss. 686, in which case this question was most elaborately considered.

Fourth, it is claimed that the judgments are void and should be cancelled as a cloud on complainants' title because the statutes of this state only authorize telegraph companies to exercise the power of eminent domain for the purpose of constructing new lines, and that in fact it is not the purpose of telegraph company to construct new lines as alleged in its applications, and

authorized by the judgments, but to attempt to maintain existing lines.

By what process of reasoning the complainant arrives at the conclusion that judgments are void because the telegraph company might undertake to do something which was not authorized by these judgments, we must confess we are unable to understand. The validity of the judgment is one thing. What the telegraph company might undertake to do under that judgment is quite another thing. In the case of *M. & O. R. R. Co.* v. *Postal Tel. Co.,* 76 *Miss.* 731, this court held, at pages 752 and 753, that these stipulations contained in the application were valid and enforceable.

By the chapter on Eminent Domain, section 1872, the Code of 1906, the whole record is required to be filed in the office of the clerk of the circuit court and remain there as a record thereof, and as such subject to be filed by any person interested and recorded in the records of the deeds of the county. In other words, the application together with all of the proceedings, down to and including the judgment, constitutes the title of the party condemning, and is the charter of its rights, defining and limiting them, and it is to this the court must look in determining whether the judgments rendered are valid or invalid, and not to any mere allegation in the bill as to what might be done by the telegraph company. In other words, in determining the question here as to whether or not the judgment is or is not void, the court must look to the proceedings themselves which were made parts of the bill, and these proceedings as set forth must control. This is a universal rule of law. See 16 Cyc. 237; 8 Ency. Pl. & Pr., p. 741, note 1; *Frieberg* v. *Magold,* 70 Tex. 116; 1 Beach on Equity Proceedings & Practice, 229; 31 Miss. 63; 64 Ill. App. 239; 30 Ill. App. 17; 97 Md. 725; 40 W. Va. 553; 122 Fed. 363.

What the telegraph company might want to do under the judgment, and what it is authorized by law to do,

are entirely different things and depend upon different considerations. The court must look to the applications and to the judgments which were rendered, to determine the validity of the judgments and cannot consider the conjectures of the complainants as to what might be done by the telegraph company in violation of the right conferred by the judgments.

In considering the matter of anticipating or taking into consideration by way of anticipation, in the condemnation proceedings, the suggestion that the telegraph company might act in violation of law, or the rights conferred by the judgments or in violation of the stipulations upon which the condemnation proceedings are had, we direct the court's attention to the following cases, which will be found instructive: *Mobile & Ohio R. R. Co.* v. *Postal Tel. Co.*, 76 Miss. 739; *Texas Railroad Co.* v. *S. W. Tel. Co.*, 77 S. W. 321; *Postal Tel. Co.* v. *Oregon Railroad Co.*, 23 Utah, 474; *Mobile & Ohio R. Co.* v. *Postal Tel. Co.*, 120 Ala. 21; *Mobile & Ohio R. Co.* v. *Postal Tel. Co.*, 101 Tenn. 62; *Atlantic Railroad Co.* v. *Postal Tel. Co.*, 120 Ga. 269-280; *St. Louis R. R. Co.* v. *Postal Tel. Co.*, 173 Ill. 508; *Postal Tel. Co.* v. *Louisiana Western R. Co.*, 49 La. App. 1270; *Chicago R. Co.* v. *Chicago*, 166 U. S. 226; *Georgia R. Co.* v. *Postal Tel. Co.*, 152 Fed. 991; *Davis* v. *Y. & M. V. R. Co.*, 73 Miss. 678. The purpose of citing these cases and the rule from Cyc., is to make it clear that in condemnation cases the presumption is, that those things alone will be done which are lawful to be done and permissible under the applications and judgments rendered, and the proceedings cannot be delayed or thwarted by conjectures or suggestions that the condemning party will act in an illegal manner, will not act in accordance with the terms of the judgment or the stipulations contained in the application.

Redress for all of these matters is ample should the occasion arise. The rules which we have set forth are

of universal application and if these matters cannot be considered in a condemnation proceeding, certainly the court would not hold the judgment void because the landowner suggested that the plaintiff, in the condemnation proceeding, would not abide by its terms. This, as we have said before, is not a bill to enjoin a threatened injury to the plaintiff arising from the doing of an unlawful act. In other words, it is not in the nature of a bill *qui timet.*

It is settled in this state that equity will not relieve if the "injury complained of is doubtful, eventual or contingent." *Green* v. *Lake,* 54 Miss. 564. "It is not enough to show probable or contingent injury, but it must be shown to be inevitable and undoubted." CAMPBELL, J., in *McCutchen* v. *Blanton,* 59 Miss. 122. See, also, High on Injunctions (4th Ed.), secs. 22 to 34, inclusive. *Id.,* sec. 832.

Fifth and sixth, it is claimed in the bill that the judgments are void: (a) Because to enforce them against complainant would be violative of the commerce clause of the Constitution of the United States, and would deprive complainant of its property without due process of law; because complainant has a right under its charter to erect telegraph lines and to operate the same; and because, before the institution of the condemnation proceedings, its right of way was and is devoted to the public use by complainant for the purpose of construction and maintenance thereon, should the necessity therefor arise, of a telegraph line; and because it has accepted the provisions of the Act of Congress approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes"; and, because, at the expiration of the contract with the Western Union, it, the complainant, contemplates operating a line over its right of way in Mississippi, and that the maintenance by the telegraph company of the telegraph

line over the right of way in Mississippi would interfere with the use of said right of way by the complainant. (b) And because the complainant, the railroad company, is a military and post road within the meaning and intent of the Act of Congress of date June 15, 1866, and the Act of Congress of date June 8, 1872, and that in passing the Act of July 24, 1866, which Act is set out in full in the bill beginning at page 19 of the transcript, the Congress dealt with the subject of the use of military and post roads by telegraph companies, and thereby took exclusive control of the subject, and excluded the legislatures of the several states, including the legislature of this state, from any right to legislate in regard thereto, and therefore, section 929 of the Code of 1906, which attempts to confer upon telegraph companies the right of eminent domain, is, in so far as it purports to confer upon the telegraph companies the right to condemn rights of way on military and post roads, operates as an illegal interference with the right of Congress to regulate interstate commerce and the instruments thereof, and that said section 929 operates to impose a burden upon interstate commerce and the instruments thereof in contravention of sub-section 3, section 8, article 1, of the Constitution of the United States.

In regard to the first contention of the complainant (a), that is to say, that it contemplates the erection and maintenance of a telegraph line upon its right of way as above set forth; it is manifest that this contention is in the teeth of the decisions of the United States in reference to this subject, construing and interpreting the purpose and effect of the Act of Congress of July 24, 1866, in that, to grant this contention would be to hold that the railroad company could, because it contemplates building a telegraph line upon its right of way and has accepted the provisions of the Act of 1866, exclude all other telegraph companies from its right of way, and thereby create a monopoly.

The supreme court of the United States has decided that a railroad company cannot grant the exclusive right to one telegraph company to construct, operate, and maintain a telegraph line on its right of way. It certainly could not have the right itself if it could not grant that to another telegraph company. *United States* v. *Union Pacific Railway Co.,* 160 U. S. 1, 40 Ed. 319, at page 333; *Pensacola Tel. Co.* v. *Western Union Tel. Co.,* 96 U. S. 1, 11 (24 L. Ed. 708, 711).

The supreme court of the United States has gone further in the case of *Pensacola Tel. Co.* v. *Western Union Tel. Co.,* 96 U. S. 1, 24 L. Ed. 708, and there held that an act of the legislature of Florida, in so far as it undertook to confer exclusive rights upon a telegraph company, was inoperative as against a corporation of another state which had accepted the conditions of the Act of Congress of July 24, 1866; and the supreme court of the state of Mississippi, in the case of *Mobile & Ohio Railroad Co.* v. *Postal Tel. Company,* 76 Miss. 731, held that a railroad company may "construct a telegraph line along its right of way, or permit another to do so, but it acquires, and can confer no exclusive right to do so"; citing *Western Union Tel. Co.* v. *Baltimore & Ohio R. Co.,* 19 Fed. 660; *Western Union Tel. Co.* v. *B. & O. S. W. R. Co.,* 11 Fed. 1; *Western Union Tel. Co.* v. *American Union Tel. Co.,* 38 Am. Rep. 781; *Pensacola Tel. Co.* v. *Western Union Tel. Co.,* 96 U. S. 1; 24 L. Ed. 708.

Our purpose in calling attention to these cases is to show that so far from the Act of Congress of July 24, 1866, giving a railroad company or telegraph company which had accepted that act, the right to exclude other telegraph companies, its purpose was to prevent this very thing and to prevent monopolies, or the hampering or trammelling of interstate commerce by the granting of exclusive rights to particular telegraph companies, either by the state or by railroad companies. *Western Union Tel. Co.* v. *Penna. R. Co.,* 195 U. S. 540, 549, ——

L. Ed. 312, 332; *Western Union Tel. Co.* v. *Penna. R. Co.*, 195 U. S. 540, 49 L. Ed. 312; *Western Union Tel. Co.* v. *Penna. R. Co.*, 195 U. S. 595, 49 L. Ed. 332; *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Western Union Tel. Co.* v. *Ann Arbor R. Co.*, 198 U. S. 239, 44 Ed. 1052; *United States* v. *Union Pacific R. Co.*, 160 U. S. 1, —— L. Ed. 319.

The right to condemn railroad rights of way has been upheld in numerous Federal cases. *Postal Tel. Co.* v. *Oregon, etc.*, —— Fed. 190; *Georgia R. & Banking Co.* v. *Tel. Co.*, 152 Fed. 991; *Western Union Tel. Co.* v. *L. & N. Railroad Co.*, 201 Fed. 946.

It is settled too well to require the citation of authorities, that telegraph business is interstate commerce. Telegraph companies are placed by Federal statutes under the jurisdiction of the Interstate Commerce Commission, and from common experience we must know that the construction of telegraph lines upon railroad rights of way, is in aid of commerce.

Gregory L. Smith, for appellee.

In two instances, the application for the eminent domain proceedings were presented to deputy clerks, and not to the clerk of the circuit court, and in each instance, appointments of the justice of the peace were made by separate writing, and not by endorsement upon the application. Under the laws of Mississippi, the justice of the peace, in an eminent domain proceeding, acts ministerially, and the whole proceedings are special and statutory. *Sullivan* v. *Y. & M. R. R. Co.*, 85 Miss. 649, 38 So. 33. In such proceedings, all of the material requirements of the statute must be literally complied with, and such compliance must appear on the face of the record. *White* v. *Memphis B. & A. R. Co.*, 64 Miss. 566, 1 So. 730; *Madden v. Louisville, N. O. & T. R. R. Co.*, 66 Miss. 258, 6 So. 181; 15 Cyc. Law & Procedure, 812; Lewis on Eminent Domain, sec. 403, 406. In the case of

White v. *Memphis B. & A. R. R. Co.*, 1 So. 730, the proceedings were under a charter, but were similar to the proceedings prescribed by chapter 43 of the Code of Mississippi, and speaking of such proceedings the court said: The remedy is summary in derogation of the common law, and is wholly governed by the statute. In such cases the material requisite of the statute must be complied with, and compliance must appear on the face of the record. As stated above, one of the contentions is that these eminent domain judgments are each void because the appointment of the justice was not made by endorsement upon the application. Section 1856, of the Code of Mississippi requires the petition or application for condemnation to be presented to the clerk of the court, and requires him to endorse thereon the appointment of a competent justice of the peace to constitute, with a jury, a special court of eminent domain, and to fix the time and place in the county for the organization thereof.

The statute requires that the appointment shall be by endorsement upon the petition, and not otherwise, and the selection of a justice of the peace and the fixing of a day for the organization of the court, are both matters requiring the exercise of judgment and discretion.

The bill of complaint shows that in neither instance was there any appointment of the justice by endorsement upon the application, and as the statute does not authorize any other method of appointment, nor the evidencing thereof in any other way, the proceeding which does not show upon its face, such an appointment by such an endorsement upon the application, fails to show on the face of the record compliance with this material requisite of the statute.

The record which the statute requires to be made in a particular way—by endorsement upon the application—fails to show any appointment of the justice of the peace, and the bill affirmatively alleges that the appointment

was not made in the only way in which such an appointment was authorized—by endorsement upon the application.

Defendant admits that eminent domain statutes must, as a rule, be strictly construed, but contends that the form of the statute of Mississippi evidences a disposition to treat the matter more liberally, and that proceedings in Mississippi, unlike the proceedings in other states, should be more liberally construed. This contention is in direct conflict with the law as enunciated in *White* v. *Memphis B. & A. R. R. Co.*, 64 Miss. 566, 1 So. 730, and is not consistent with the frame of the statute. The statute definitely fixes the steps to be taken, and their exact forms including the exact forms in which verdict shall be rendered and the judgment entered. Under the laws of Mississippi, the deputy clerks cannot exercise the authority vested in the clerks to order the institution of eminent domain proceedings.

Section 1006 of the Code of Mississippi (which is a part of chapter 27) provides: That the clerk of the supreme court, of the circuit court and of the chancery court shall have power, with the approbation of the court, or the judges in vacation, to appoint one or more deputies, who shall take the oath of office, and who thereupon shall have uower to do and perform all the acts or duties which their principals may lawfully do.

The acts which the deputies are authorized by this section to do are acts relating to the performance of the duties of the clerk of the court *virtuti officio,* and does not include other acts to be done under special authority conferred upon the clerks by statute.

Section 1000 (which is also a part of chapter 27 of the Code) provides as follows: Each court shall have control over all proceedings in the clerk's office of such court during the preceding vacation, and may correct any errors or mistakes therein, and may set aside any of said proceedings, and may make such order therein as may

be just and proper; and may, for good cause shown, reinstate any case discontinued during said vacation; and shall also have power to arrange the business therein in a convenient manner, and to establish, from time to time, rules and orders for the conducting of suits and proceedings and respecting all matters to be done in term time, or in vacation not repugnant to law."

Under section 1856 (which is part of the eminent domain chapter) the clerk is required to fix a time for organizing the court of eminent domain and if the provisions of chapter 27 of the Code were applicable to the duties of the clerk performed under the eminent domain chapter, the circuit judge could, under section 1000, change the time fixed by the clerk for organizing the eminent domain court, or should the clerk fail to fix such time, the judge would have the authority to do so, and yet the supreme court of Mississippi has clearly held that the judge has no such power.

In *Sullivan* v. *Y. & M. V. R. R. Co.*, 85 Miss. 649, 38 So. 33, the supreme court, reviewing an order of mandamus issued by the circuit court, wherein it had directed the eminent domain court to proceed upon a day fixed by the circuit court, said: "The clerk of the circuit court is directed by law to fix a time at which, and the place where, the court of eminent domain is to meet and to summons eighteen men from whom the jury is to be selected. We do not think the circuit judge had power to fix the time or place in his order for the reconvening of the eminent domain court, or to direct the justice of the peace to have other competent parties summoned as jurors."

That section 1006 of the Code of Mississippi only applies to the acts of the clerks *virtuti officio*, see: *Muller* v. *Boggs*, 25 Cal. 175; *Harrison* v. *Harwood*, 31 Texas 650; *State* v. *New Jersey*, 25 N. J. Law 309. Again, the act of a clerk in appointing a justice of the peace as a constituent part of an eminent domain court is neces-

sarily judicial in its nature. He is required to make the appointment of a competent justice, and must necessarily determine whether the justice is or is not competent; he is required to make the appointment when the allegations of the application show that the applicant has the right to condemn, and he should not do so if the application fails to show that the applicant has the right to condemn. This results from the fact that unless the application shows the right to condemn, the clerk has no power to appoint a justice of the peace, or to make any other order, and any proceeding under such application is a nullity. *Cumberland Tel. & Tel. Co.* v. *Yazoo & M. V. R. R. Co.*, 90 Miss. 648, 44 So. 156. A deputy cannot perform a duty imposed upon his principal which involves the exercise of discretion and judgment. 23 Am. & Eng. Ency. Law, 365-6; 1 Am. & Eng. Ency. Law, 975; 11 Cyc. 397; 29 Cyc. 1, 433; Mechem on Public Officers, 567.

In the case of the *Railroad Company* v. *Heister*, 8 Penn. State, 445, 482, a statute provided that in inquisition proceedings to determine the value of land taken by a railroad, the court of sessions should, on application of the owner, "issue a precept to the sheriff, commanding him to summons twenty disinterested freeholders" to ascertain what damage had been sustained and that twelve of the jurors should be impanelled and sworn by the sheriff, or his deputy, to estimate the value of the land, the sheriff, instead of summoning the jurors from the county at large, summoned them from a list prepared by his deputy. The court said: "In the two cases of *McClure* v. *Doctor Riley*, exception is taken to the manner of selecting and summoning the jurors. Although I am perfectly satisfied of the integrity of the transaction, yet I am convinced that the sheriff has proceeded in a mistaken view of his public duty. The sheriff is commanded to summons twenty discreet and disinterested freeholders from the body of the county, and not from a

list prepared by another, although that other may be the deputy sheriff." *McMaster* v. *Carrothers,* 1 Penn. State 324.

In *Summer* v. *Roberts,* 31 N. C. 527, it was held that a deputy clerk could not certify the probate of a will, the act being considered judicial in its nature. In *Carlisle* v. *Carlisle,* 2 Harr. 318 (Delaware), the court said: "Whenever the legislature has, by statute, conferred upon a ministerial officer, such as the prothonotary, a power requiring the exercise of judgment and sound discretion for the protection of interest which are manifestly from the face of the statute, the subject of legislative solicitude, he cannot delegate the trust to another, but must faithfully discharge it himself. If he delegates the power to another, to be exercised in his absence, the interest intended to be protected by the act cannot be affected by the exercise of such power."

It is submitted, therefore, that the order made by the deputy clerk of the circuit courts were unauthorized and void, and did not justify the organization, by the justices of the peace appointed by him, of eminent domain proceedings. Section 929 of the Code of Mississippi, granting to telegraph companies a right to condemn railroad rights of way, when applied to post roads, interferes with the regulation of interstate commerce by congress and is, for that reason, void.

The amendment of June 18, 1910, of the Interstate Commerce Act (1 Sup. Fed. Stat. 1912, p. 111), makes both complainant and defendant instruments of interstate commerce and subject to the regulations of Congress. *Mondou* v. *N. Y., N. H. & H. R. R. Co.,* ———— ————; *Southern Ry.* v. *United States,* 22 U. S. 21; *Northern Pac. Ry.* v. *Washington,* 22 U. S. 371. The bill of complaint shows that complainant's railroad is a post road, and as such, as well as because it is an instrument of interstate commerce, Congress has the right to regulate it (*Pensacola Tel. Co.* v. *Western Union Tel. Co.,*

96 U. S. 1), and when regulated in any respect by Congress that regulation is, in that respect, exclusive. *Missouri Pac. Ry.* v. *Larabee Mills,* 211 U. S. 621; *Southern Ry.* v. *Reid,* 222 U. S. 437.

An act to aid the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes: "Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that any telegraph company now organized, of any state in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, and along any of the military or post roads of the United States, which have been, or may hereafter be, declared such by act of Congress, and over, under or across the navigable streams or waters of the United States. Provided: That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads (railroads). And any of such companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may preempt and use such portion of the unoccupied public lands subject to preemption through which its said lines of telegraph may be located as may be necessary for its station, not exceeding forty acres for each station; but such station shall not be within fifteen miles of each other. Section 2, "And be it further enacted, that telegraph communication between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the post-

master-general. Section 3, "And be it further enacted, that the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person; Provided, however, that the United States may at any time after expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent disinterested persons, two of whom shall be selected by the postmaster-general of the United States, two by the company interested, and one by the four so previously selected. Section 4, "And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptances with the postmaster-general, of the restrictions and obligations required by this act."

By this act Congress undertook to deal with the subject of the use of post roads by telegraph companies and prescribed the terms and conditions upon which they should be used. Construing this act, the supreme court of the United States has held that it only granted to telegraph companies the right to use the rights of way of post roads when the consent of such roads, to such, was obtained. *Western Union* v. *Penna. R. Co.*, 195 U. S. 540.

This act, therefore, authorizes telegraph companies to use the rights of way of post roads upon condition: (1) That they obtain the consent of the railroads to such use; (2) That such lines of telegraph shall be so constructed and maintained as to not obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads; (3) That telegraph communications between the several departments of the governments of the United States, and their officers and agents, shall, in their transmission over the lines of any

interstate companies, have priority over all other business, and shall be sent at rates to be annually fixed by the postmaster-general; (4) That the rights and privileges hereby granted shall not be transferred by any company acting under this act, to another corporation, association or person; (5) That the United States may, at any time after the expiration of five years from the date of the passage of said act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any and all of said companies at an appraised value to be ascertained by five competent disinterested appraisers, two of whom shall be selected by the postmaster-general of the United States, two by the company, and one by the four so previously selected; (6) That before any telegraph company shall use such post roads, such company shall file its written acceptance with the postmaster-general of the restrictions and obligations required by this act.

By this act, Congress clearly occupied the field of legislation upon this subject, and under the authorities quoted above, its control of that subject became exclusive. The laws of Mississippi not only undertakes to regulate the same subject but are in direct conflict with the Act of Congress. They undertake to authorize telegraph companies to use the rights of way of railroads without the railroads' consent, although Congress has expressly provided that they shall do so only with the consent of such railroads.

The state law undertakes to authorize telegraph companies to use such rights of way without accepting the condition that Congress has required them to accept before using the same. The state undertakes to discharge telegraph companies using post roads, from the duty of giving priority to telegraphic communications between the several departments of the government of the United States, and their officers and agents, and to discharge them of the obligation to send such telegrams at rates to be annually fixed by the postmaster-general.

The state law undertakes to discharge the telegraph companies of the obligation to sell its lines to the United States. In short, the state law undertakes to annul and destroy the entire purpose of the Act of Congress, and is necessarily in conflict with the Act of Congress, and therefore void.

SMITH, C. J., delivered the opinion of the court.

Appellant owns and operates a telegraph line extending along the right of way of appellee's railroad. This telegraph line is maintained by appellant by virtue of a contract entered into by it and appellee. This contract being about to expire, appellant instituted three separate eminent domain proceedings, one in Jackson county, one in Harrison county, and one in Hancock county, for the purpose of condemning a right of way for a new line to be erected along appellee's railroad in these counties.

Pursuant to the petitions instituted therefor, these eminent domain courts assembled, and judgments were rendered fixing the amount of compensation to be paid by appellant to appellee for the use of its right of way. From these judgments no appeal was taken by either party. Some time after these judgments were rendered, and before the expiration of the contract under which appellant was operating its telegraph line along appellee's right of way, appellee filed the bill herein, praying that appellant be restrained during the pendency of this suit —"from entering upon or using, otherwise than under the existing contract between the complainant and the defendant, any portion of complainant's said right of way or bridges, hereinabove described, for the purpose of erecting, continuing, or maintaining its telegraph poles, wires, and other appliances and from attaching its poles, wires, or other parts of its line to complainant's bridges or any part of them, until this cause is finally heard and determined; . . . that at the hearing of this cause, this honorable court will be pleased to decree

that the several judgments of condemnation for the use, by the Western Union Telegraph Company of parts of the right of way of complainant, for the erection by the said Western Union Telegraph Company of its poles, wires, and appliances, and of the right to attach its poles, wires, and other parts of its line to complainant's bridges or any part of them, to be clouds upon the title of complainant's right of way, for the several reasons assigned in the foregoing bill of complaint, and that this honorable court will be pleased to decree said several condemnation proceedings, and the said several judgments rendered therein, to be void and of no effect, and that it will permanently enjoin the said Western Union Telegraph Company from entering upon, taking possession of, or erecting any of its wires or other appliances upon complainant's bridges or to any of them after the termination, by notice or otherwise, of the contract under which it now occupies said right of way with its telegraph line."

On the filing of this bill a temporary injunction was granted, and thereafter a motion was filed by appellant to—

"dissolve the injunction heretofore granted in this cause against it, for want of equity on the face of the bill."

This motion was by the chancellor overruled, and from the decree so ordering an appeal was granted to this court to settle the principles of the case.

Section 1856 of the Code provides that the application to exercise the right of eminent domain—

"shall be presented to the clerk of the circuit court of the county, who shall indorse thereon his appointment of a competent justice of the peace of the county in which the property, or some part thereof, is situated to constitute, with a jury, the special court of eminent domain."

In two of these eminent domain proceedings the appointments of the justices of the peace were not indorsed upon the application, but were made in writing upon

separate sheets of paper and filed with the papers in the cause. This fact, appellee claims, renders these judgments void, because, in the language of its counsel:

"All of the material requirements of the statute must be literally complied with, and such compliance must appear on the face of the record."

The rule as thus announced is not strictly accurate.

"Every essential prerequisite to the jurisdiction called for by the statute must be strictly complied with, and this must affirmatively appear on the face of the proceedings, in order to give them validity." 15 Cyc. 812; *White* v. *Railroad Co.*, 64 Miss. 566, 1 So. 730. But "a strict compliance with the statute does not necessarily mean a literal and exact compliance. A substantial compliance will suffice." 1 Lewis's Eminent Domain (3d Ed.), sec. 387; *White* v. *Railroad Co.*, 64 Miss. 566, 1 So. 730; *Darrow* v. *Railroad Co.*, 169 Ind. 99, 81 N. E. 1081; *Nickerson* v. *Lynch*, 135 Mo. 481, 37 S. W. 128; *Charleston* v. *Comstock*, 36 W. Va. 263, 15 S. E. 69; *Dodge County* v. *Acom*, 61 Neb. 376, 85 N. W. 292.

The essential requirement of the statute is that the justice of the peace shall be appointed in writing, and the indorsement thereof upon the application is a mere detail to provide for the more effectual preservation of the evidence of the appointment. The indorsement of the appointment of the justice of the peace on the application is not essential to the jurisdiction conferred by the appointment, and a failure of the clerk to indorse the appointment thereon is a mere irregularity, not open to review in this proceeding.

In two of these counties the applications were filed with deputy circuit clerks, who thereupon discharged the duties relative thereto imposed upon the circuit clerks. Section 1006 of the Code provides:

"The clerk of the supreme court, of the circuit court, and of the chancery court shall have power, with the approbation of the court, or of the judges in vacation,

to appoint one or more deputies, who shall take the oath of office, and who thereupon shall have power to do and perform all the acts and duties which their principals may lawfully do."

It is argued, however, by counsel for appellee that:

"The acts which the deputies are authorized by this section to do are acts relating to the performance of the duties of the clerk of the court *virtuti officio,* and does not include other acts to be done under special authority conferred upon the clerks by statute."

This contention was settled adversely to appellee in *McRaven* v. *McGuire,* 9 Smedes & M., 34, and *McCraven's Heirs* v. *Doe ex dem. McGuire,* 23 Miss. 100.

Another reason advanced by counsel for appellee in support of the decree rendered in the court below is that:

"Section 929 of the Code of Mississippi, granting to telegraph companies a right to condemn railroad rights of way, when applied to post roads, interferes with the regulation of interstate commerce by Congress and is, for that reason, void."

The right of appellant to erect and maintain its telegraph line along appellee's railroad is not derived primarily from section 929 of the Code of Mississippi, but from an act of Congress passed on July 24, 1866 (Act July 24, 1866, ch. 230, 14 Stat. 221), entitled "An act to aid in the construction of telegraph lines, and to secure to the goverment the use of the same for postal, military, and other purposes," which provides:

"That any telegraph company now organized, or which may hereafter be organized under the laws of any state in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable" streams or waters of the United States.

This statute contains no provision conferring upon telegraph companies the right to obtain by eminent domain proceedings a right of way along the line of a railroad company, and it is argued by counsel for appellee that it is beyond the power of the state to confer any such right upon them. This point seems not to have been decided by the supreme court of the United States, but in *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co.*, 195 U. S. 574, 25 Sup. Ct. 142, 49 L. Ed. 312, 1 Ann. Cas. 517, the court, in holding that the telegraph company had no right under this statute to appropriate any portion of the railroad company's right of way without its consent, referred to the fact that "it is admitted that the statutes of New Jersey (the state in which the litigation arose) do not confer the right of eminent domain upon the telegraph company." The power of a state, however, to confer such a right upon telegraph companies to be exercised by them in making effective the right conferred upon them by the act of Congress here in question has been upheld in several cases decided in Federal, district and circuit courts. *Postal Telegraph & Cable Co.* v. *Southern Railroad Co.* (C. C.), 89 Fed. 190; *Postal Telegraph & Cable Co.* v. *Cleveland, etc., R. R. Co.* (C. C.), 94 Fed. 234; *Postal Telegraph & Cable Co.* v. *Oregon, etc., R. R. Co.* (C. C.), 104 Fed. 623; *Postal Telegraph & Cable Co.* v. *Oregon, etc., R. R. Co.* (C. C.), 114 Fed. 787; *Georgia R. R. Co.* v. *Telegraph Co.* (C. C.), 152 Fed. 991; *Western Union Telegraph Co.* v. *L. & N. R. R. Co.* (D. C.), 201 Fed. 946.

Several of these cases were reviewed in *Western Union Telegraph Company* v. *Pennsylvania Railroad Compay, supra,* at page 570 of 195 U. S., at page 141 of 25 Sup. Ct., at page 323 of 49 Law Ed., at page 524 of 1 Ann. Cas., and the court pointed out that while the opinions rendered contained language supporting the contention that the right of eminent domain was conferred by the act of Congress in question, that in each of the cases

the right was exercised by virtue of the statutes of the state in which the case arose.

We are of the opinion that the state has the power to confer the right of eminent domain here called in question, and that section 929 of the Code is valid.

But it is said that the bill alleges that it is the intention of appellant to maintain its existing telegraph line, and not to erect a new one, and therefore the injunction should be continued for that reason alone; for, conceding that the eminent domain judgments are valid, appellant has no right under the statute to condemn any portion of appellee's right of way for the purpose of maintaining an existing line, but only for the purpose of erecting a new line. We do not understand the bill to be framed on any such theory. As we understand the bill, one of the reasons assigned for holding the eminent domain judgments void is that appellee's purpose in obtaining them was to maintain an existing, instead of erecting a new, line. Conceding that appellee's purpose in obtaining these judgments was as stated, that fact will not render the judgments void. Should appellant seek to use them as a means for maintaining an existing, instead of a new, line, its right so to do can then be determined in a proper proceeding instituted for that purpose.

We are requested by counsel for appellant to dismiss the bill in event the decree of the court below is reversed, for the reason that no question of fact is to be determined; the sole ground of the motion to dissolve being the want of equity on the face of the bill. This we cannot do, because the only final judgment which this court can render when a judgment is reversed is such as should have been rendered in the court below, and the court below on the motion to dissolve was without authority to dismiss the bill.

The decree of the court below will be reversed, the motion to dissolve the injunction will be sustained, and the cause remanded.

Reversed and remanded.

HUGGINS v. HOME MUTUAL FIRE INSURANCE COMPANY.

[65 South. 646.]

1. CONSTITUTIONAL LAW. *Class legislation. Power of legislature. Statutes. Mutual assessment company. Liens. Insurance. Enforcement. Jurisdiction.*

The State may distinguish, select and classify object of legislation, and necessarily the power must have a wide range of discretion.

2. CONSTITUTIONAL LAW. *Class legislation. Laws* 1912, *chapter* 171.

Laws of 1912, chapter 171, which provides for the organization of mutual insurance corporations, limits the amount of insurance to be taken on each risk; gives to all policy holders the right to vote for directors; requires that a majority of the directors shall be residents of this state; provides for dividends to be paid to policy holders out of the earnings; for assessment of policy holders, whenever necessary to pay losses is not invalid as class legislation, as it applies to all companies doing a similar business.

3. STATUTES. *Mutual assessment company. Lien. Laws* 1912, *chapter* 171.

Laws 1912, chapter 171, section 18, which provides that premium notes taken by mutual fire insurance companies and all assessments shall constitute a lien on the property insured, and the land on which it is situated, upon the filing of a certificate with the clerk of the chancery court showing the facts is not invalid because it contains no direction as to what particular book in the office of the clerk of the chancery court, the certificate shall be recorded in, since the lien commences upon the filing of the certificate with the clerk and it makes no difference whether it is recorded or not.

4. MUTUAL FIRE INSURANCE. *Lien. Enforcement. Jurisdiction.*

The jurisdiction of equity is inherent to enforce the lien given mutual fire insurance companies by the Laws 1912, chapter 171, section 18, upon property insured and it is unnecessary for the statute to expressly confer such jurisdiction.

APPEAL from the chancery court of Alcorn county.
HON. J. Q. ROBBINS, Chancellor.

Bill by the Home Mutual Fire Insurance Company, against J. E. Huggins. From a decree for complainants, defendant appeals.

Appellee was complainant in the court below, and appellant was defendant. From a decree granting the relief prayed by the complainant, this appeal is prosecuted. The opinion states the facts.

Sections 17 and 18 of chapter 171 of the Laws of 1912 provide that mutual fire insurance companies may take notes in payment of premiums, and that such notes and all assessments legally made against policy holders shall constitute a lien on the property insured and the land on which same is situated, provided the company files with the chancery clerk a certificate showing the facts.

W. H. Kier, for appellant.

The only questions presented for decision on this appeal are: Does section 18 of said Acts of 1912, chapter 171, create a valid lien in favor of Mutual Fire Insurance Companies on the property insured, and the land on which same is situated, to secure the premium notes? And does the failure to provide any scheme or plan for the enforcement of the lien attempted to be given, render said section invalid so far as it attempts to create a lien in favor of mutual companies to secure the payment of premium notes and assessments legally assessed against policy holders? The assignment of error in this case relates to the foregoing propositions.

While it is a recognized principle that the legislature has the right to create liens for the security of certain debts and obligations contracted, and where they are not recognized either by the common law or by equity, yet these statutory liens are regarded with jealousy, and as a general proposition, are to be strictly construed, and when the same are attempted to be created, there must also be provided some remedy for their enforcement. The statute in this case is not sufficiently specific in that it

does not provide in what records the certificate stating the amount of note, date when due, etc., and describing the property shall be recorded. While it may be said that it is manifest what records are referred to, or what records it is intended that the said certificates shall be recorded in, yet we maintain that is not a matter which should be left to conjecture, and unless it should be specified in what records the certificate is to be recorded it is indefinite and uncertain to such an extent as render invalid the lien attempted to be created by this section invalid. The section says: "The chancery clerk shall record and index the certificates in the proper records," but does this mean that the chancery clerk shall record the certificate in some records already provided by law to be kept in his office, or does it mean that he shall procure some other and special records for indexing and recording these certificates.

There is also another ground on which we contend that the section so far as it attempts to create a lien in favor of mutual companies is invalid, and that is that in limiting the lien created to mutual companies it thereby excluded the idea of any lien for premium notes in cases where property is insured and notes taken for the premium by any insurance companies other than mutual companies, and is therefore in the nature of class legislation. Under the provisions of this act we are met with different propositions than those contained in the chapters of the Code of 1906 with reference to the liens of Mechanics and Material Men, etc., in each of which the liens there given are general, and provision is made for the scheme or plan by which the lien may be enforced.

In the creation of statutory liens there must always be a means or method providing for enforcing those liens. Though it is one of the maxims of law that equity will not suffer a right to exist without a remedy, it is incumbent upon the law-making branches of government in the enactment of laws of this class to prescribe the methods by

which the rights attempted to be established shall be acquired. And if, under chapter 171 of the Acts of 1912, the company has a full and complete remedy at law there is no necessity for the intervention of the chancery court. We respectfully submit that section 18 of said acts does not create a valid lien in favor of mutual fire insurance companies for all notes, or for any notes, given for premiums or for assessments legally assessed against policyholders.

Tim E. Cooper, for appellant.

I shall not, at any great length go into the assignments of error, nor a reply to the brief of the appellant. The whole contention of the appellant is: First, that the act of March 15, 1912 (Acts, chapter 171), is unconstitutional because it is claimed it is not in the power of the legislature to pass the act. The act itself is invalid because it contains no directions as to what particular book in the chancery clerk's office a record is to be made of the certificates required to be filed by section 18, of the act. Third, that if the act is constitutional and sufficiently definite in its scope, the chancery court was not given jurisdiction to enforce the lien given by the act in favor of the insurance company on the property insured for the payment of the premiums agreed to be paid.

As to the first point, I have only to say that the whole body of the act shows that mutual insurance companies form a proper class to be dealt with by legislation. The purpose of the act is apparent; it is to reduce the cost of insurance by providing in effect for a distribution among the insured of the surplus derived from the premiums not necessary to be paid in losses nor in the expenses of the management. Companies of this sort are not unkown in the history of many states. A familiar illustration is to be found in those sections of the country in which, during the early crop season hailstorms prevail. These storms are narrow in extent, but sweep to utter destruc-

tion the crops that lie in their path. No very great machinery is needed for the administration of the hail-storm companies. All farmers in a particular locality agree to contribute a fixed sum per acre. Wherever a storm occurs, a committee appointed by the inhabitants, goes upon the ground and inspects the injured crops and makes it report. At the end of the year whatever remains in the treasury is divided out *pro rata* among the assured and the operations of the company become practically suspended until next year. This is the simplest form of mutual insurance known to me.

The purpose of the act is not only to reduce the cost of insurance, but to give security to those insured and so, by the first section, a deposit of twenty-five thousand dollars is required to be made and it is further provided by said section that no policy for more than one thousand five hundred dollars shall be written on any one risk.

I will not take the time of the court to go through an examination of the statute. The Mutual Insurance Companies are practically confined, in their operation, to rural insurance, thus covering a field in which many of the old line companies refuse to operate. So salutary and much needed a statute must necessarily deal with these mutual insurance companies as a separate and distinct class intended to operate largely in the country with small risks and among a class of people who are frequently not prepared to make payments in cash of the premium. The reason why the rate of interest paid by the farmers of the country is so much greater than that paid by any other class of people, is because of the doubtfulness of the security and the further fact that farmers, as a class, are not in the habit of promptly meeting their financial arrangments. The legislature, by section 17, of the act, attempted to give credit to the assured by providing that notes might be given for the premiums and by section 18, by fixing a lien upon the insured property for the payment of such notes.

I will not trouble the court with citation of authorities to support the proposition that the discretion of the legislature, in creating the dealing with a class, will not be disturbed unless the attempted classification is purely arbitrary and fanciful. The next objection made is, that the act is indefinite, because it does not provide in which particular record the certificates required to be made by section 18, shall be recorded. In the brief of associate counsel, reference is made to the authorities holding that where no particular book is pointed out, any proper book in the recording office may be used. But in addition to this, it is submitted that the lien does not depend upon the actual recordation by the clerk of the certificate required to be filed. The act provides that, "the lien of the company shall not take effect until the company files with the chancery clerk of the county in which such property is located, a certificate stating the date, amount of said premium note or contingent liability, the time when due, the number and amount of the policy and such description of the property insured as will enable any person readily to identify the same." It is this filing with the clerk upon which the lien rests and just as the filing of a deed is a compliance with our recording act from the date of such filing, so the filing with the clerk the certificate named gives effect to the lien. If the clerk fails to record and index the certificate, as requires in the succeeding clause of the statute the lien is not affected. Any third person by such failure would have a right of action against the clerk and his sureties for indemnity.

But there is another reason, which seems to me to be a further reply, if any were needed, to this contention of counsel. The certificate required to be filed was thus required, in order that notice might be given to other creditors of the assured of the existence of the lien. The assured is not a party to make the objection, for he, of course, knowns the facts which the company is required

to certify. The only remaining proposition advanced by counsel for the appellant is that the chancery court did not have jurisdiction to enforce the lien given by the statute. The jurisdiction of the chancery court in cases of this class is inherent and rests upon the familiar principal that, where a right is given by law and no remedy for its enforcement, the chancery court will afford a remedy. Especially is this true in reference to liens upon real estate. Where liens are given by statute and no remedy provided, such liens are enforcible in equity. 12 Cyc., pp. 681-682; *R. R. Co.* v. *Fackney,* 78 Ill. 116; *Dobyns* v. *Railroad,* 75 Pac. 156; *Gilchrist* v. *Railroad,* 58 Fed. Rep. 708; *Davis* v. *Alvord,* 94 U. S. 545, 24 L. Ed. 283; 2 Pom. Equity, secs. 1268-1269; *R. R. Co.* v. *Davis,* 62 Miss. 271. The only contrary statement of the law that I have found seems to be in Jones on Liens, sec. 112. It is not very clear what the learned author means. He says: "In some of the states mechanics' liens are enforced by ordinary equitable proceedings resulting in a decree for the sale of the property. The equitable jurisdiction is in such cases created by the statute and the remedy cannot be enlarged by the exercise of the general equity jurisdiction of the court." For this statement, the author cites only the case of *Canal Co.* v. *Gordan,* 6 Wallace 561.

If the author means that the right given by the statute could not be enlarged by a court of equity, the statement is correct on principle and is supported by the authority cited. If he means that the remedy afforded will not be co-extensive with the right given, he is neither supported by principle nor by the authority

In the case cited, the complainant had done work on a canal or flume. He claimed a lien on the whole canal, a section of which had been completed before he began work and the circuit court had, by its decree, subjected the whole canal to his lien. The supreme court of the United States, upon a construction of the statute creating

the lien, held that the lien of complainant existed only on that section of the canal on which he worked and did not extend to so much of it as had been completed before he began to work.

The substantial right of the complainant was the subject under consideration and there is nothing in the opinion to suggest that the remedy was not co-extensive with the right given by the statute. On the contrary, the court afforded a complete remedy to the full extent of the law."

W. D. Conn, for appellee.

Counsel for appellant conceded that the legislature has the power to pass a law creating a lien of the character of the one here sought to be enforced; but he questions the manner in which it has exercised this power, in the enactment of chapter 171, of the Laws of 1912.

His first objection is that the legislature failed to provide any remedy for the enforcement of this lien. It is true that no method of enforcing the lien is provided for in this statute, and counsel says: "When the same (statutory liens) are attempted to be created there must also be provided some remedy for their enforcement." He concedes the equitable maxim that equity will not suffer the right to exist without a remedy, but seems to deny that the case at bar presents a situation where this doctrine ought to be applied.

It seems to us that this case presents a fine opportunity for the proper application of the doctrine just referred to. It is not pretended that the law does not give the right, or that the legislture did not have the power to enact the law. Appellee has the statutory right, but no statutory remedy. Has a court of equity the power to supply this deficiency? In 19 Am. & Eng. Ency. Law (2nd Ed.), at page 35, is found the following: "When a statutory lien is something more than a mere right of detainer and the statute provides no adequate method of

its enforcement, or the statutory remedy is for some reason unavailable, equity has jurisdiction to enforce it. In 25 Cyc., near the top of page 682, is found the following: "A court of equity is also the proper tribunal in which to enforce statutory liens where the statutes provide no method of enforcement."

We have found no authority opposed to the rule just stated, and we believe that counsel for appellant cannot cite, as he has not, a single authority to support his contention that a court of equity has not power to enforce a lien created by law, where the law does not provide a remedy. Again, objection to the statute is made on the ground that it is not sufficiently specific in its directions as to the record in which shall be entered the certificate stating the amount of note, date when due, etc. In discussing this proposition, counsel says: "While it may be said that it is manifest what records are referred to, or what records it is intended that the said certificate shall be recorded in," and we think that this manifestly obviates any objection he could raise on this score. But if his admission is not a complete answer to his objection, it can be disposed of in another way. In contemplation of law, an instrument is deemed to have been recorded when it has been filed for the purpose of being recorded, as the law directs it shall be filed. Out of this doctrine has grown the more specific doctrine that where the law does not indicate in what book a certain instrument shall be recorded, it may be recorded in any book by the recording officer. In 34 Cyc., near the top of page 589, the law on this point is stated as follows: "Instruments not required by statute to be recorded in any particular book may be recorded in any book kept by the recording officer which is not exclusively devoted to the record of other instruments."

In the case of *Glading* v. *Frick,* 88 Pa. St. 460, the court uses the following language: "In contemplation of law, a paper is recorded the moment it is lodged in the office

and the fees paid. In point of fact, it may not be, and in many instances is not, actually entered in the books until months afterward. Where a man has complied with the law by depositing his papers in the recorder's office and paying the fees, it would be a hard rule that would deprive him of his lien or his estate because of an error of the recorder in recording the instrument in the wrong book. It would be different were there an act of assembly directing in what book the particular paper should be recorded. In such a case, the recorder might be liable upon his official bond for a failure to record as required by law. In the absence of any such act, we are unable to see how we can declare that a paper is not recorded when the holder has done all that the act of assembly requires in placing it on record. To do so would seem very much like legislation." In this case the court held that, where certain instruments of writing are not required by law to be recorded in a particular book, they may be recorded in any book kept by the recorder; and that a building contract was valid though recorded in a deed-book.

In the case of *Farabee* v. *McKerrinhan,* 172 Pa. St. 234, the Pennsylvania supreme court reaffirmed the doctrine laid down in *Glading* v. *Frick,* and went into an extended examination of the authorities on the proposition. We have found nothing in the books denying the proposition. Fnally it is argued that this statute is class legislation. We are sure this contention is not sound. That a law which applies to all of a class is not "class legislation" is so well established in this state, and everywhere else for that matter, we will not argue the proposition or cite any authorities to support it. This law applies to all "mutual" insurance companies, and they are not *sui teneris.* It is true that all insurance companies are alike in many features; but the mutual feature differentiates mutual companies and puts them in a class by themselves.

That mutual companies are in a class by themselves, the court will only have to refer to the statutes under

which they are organized, to see it clearly. We will not here set out all the many things required of mutual companies, in order that they may have the right to do business thereunder. In the recent case of *Hasell* v. *Merchants Union Insurance Co.*, 62 So. 645, this court responded to the suggestion that chapter 167, Laws of 1912, the Building and Loan Association Law, was special legislation, in violation of the state Constitution, and held that said law was not a special but a general law. The court pointed out the features of a building and loan association, and the contracts made by them, which differentiated them from other lenders of money. The pleadings in this case show that appellee was organized under this mutual insurance enactment, and the court will readily see there are a great many things required of companies organized under it, so many in fact as to leave no room for doubt but that they are in a class all by themselves, more so possibly than are building and loan associations in a class by themselves; yet this court held that law not special legislation, although the Constitution expressly provides that the legislature shall not pass special laws regulating the rate of interest on money. There is no such constitutional inhibition against mutual fire insurance companies, and if there were, this court would have to hold that this law was general and not special, or else overrule the Hasell case, *supra.*

We believe this case was correctly decided by the trial court, and we submit that the decree ought to be affirmed by this court.

COOK, J., delivered the opinion of the court.

The Home Mutual Fire Insurance Company, appellee, exhibited its bill of complaint in the chancery court of Alcorn county against appellant, in which it is alleged that it is a Mutual Fire Insurance Company, chartered and organized under chapter 171 of the acts of the legislature of 1912, and as such it had issued its policy to

appellant in the sum of five hundred dollars, insuring a certain building against loss by fire. It is further alleged that appellant accepted said policy, and for the premium due thereon appellant executed and delivered to appellee his promissory note for twenty dollars, due and payable May 1, 1913; that said note is long since due and appellant had failed and refused to pay same. The prayer of the bill is that the title to the land upon which the building insured is located be vested in a commissioner, who shall be ordered to advertise the same for sale in the manner provided by law, and out of the proceeds the note, interest, and costs be paid.

Appellant answered the bill of complaint, admitting all of the allegations, but denying the power of the chancery court to grant the relief prayed for.

The cause was set down on bill and answer, and the court decreed that complainant was entitled to relief and ordered the land sold by a commissioner to satisfy the claim sued on.

The contention of appellant is: First, that the act of the legislature of 1912, being chapter 171 of the Laws of 1912, is unconstitutional, because it is alleged to be class legislation. Second, that, conceding the power of the legislature to pass the act, the act in question is invalid because it contains no direction as to what particular book in the office of the clerk of the chancery court a record is to be made of the certificates required to be filed by section 18 of the act. Third, if the act is constitutional and sufficiently definite in its scope, the chancery court is not given jurisdiction to enforce the lien given by the act in favor of the insurance company on the property insured.

It is not shown wherein the act under review is unconstitutional, except to say that it is class legislation. The act criticised provides for the organization of mutual insurance corporations; limits the amount of insurance to be taken on each risk; gives to all policyholders the right

to vote for directors; requires that a majority of the directors shall be residents of this state; provides for dividends to be paid to policyholders out of the earnings, for assessment of policyholders, whenever necessary to pay losses, etc. It does not appear that the class of corporations embraced within the provisions of the act are given powers and privileges not accorded to all corporations doing a similar business.

In *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, the supreme court of the United States, discussing the principle of reasonable classification, said that the state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion.

In *Orient Insurance Co.* v. *Daggs*, 172 U. S. 562, 19 Sup. Ct. 281, 282 (43 L. Ed. 552), the court, quoting with approval *Magoun* v. *Illinois Trust Co., supra*, remarked:

"And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical and is not reviewable unless palpably arbitrary."

We can see no discrimination against some in favor of others in this act. We are unable to say that the classification adopted by the legislature is arbitrary, capricious, or fanciful.

The second contention is without merit, because section 18 provides that the lien shall take effect when the certificate is filed with the chancery clerk, and it makes no difference whether it is recorded or not.

As to the third contention, we are of opinion that the jurisdiction of the chancery court to enforce the remedy prayed for is inherent, and it was not necessary for the statute to confer upon the court the power to enforce the lien. The statute gives the right, and the court has the power to enforce same. 12 Cyc. 681; *Railroad Co.* v.

Fackney, 78 Ill. 116; *Dobbins* v. *Railroad,* 19 Colo. App. 257, 75 Pac. 156; 2 Pomeroy's Equity, secs. 1268, 1269.

The points considered are the points relied on by appellant, and, believing that all are without merit, the decree of the lower court is affirmed.

Affirmed.

LE BARRON v. STATE.

[65 South. 648.]

1. GRAND JURY. *County prosecuting attorney. Presence before grand jury. Indictment and information. Motion to quash. Grounds. Appeal. Evidence. Prejudice. Evidence. Photographs. Rulings on evidence.*

It is made the duty of the county prosecuting attorney under Laws 1912, chapter 253, section 5, to represent the state in all matters coming before the grand jury of his county, and it is proper for him to be before the grand jury in its investigations of offenses but he should take no part in the jury's deliberations.

2. INDICTMENT AND INFORMATION. *Motion to quash. Grounds.*

It is no ground to quash an indictment that the district attorney was before the grand jury during its deliberation and when the indictment was voted on, in the absence of a showing that a defendant was prejudiced thereby, since it is his duty to render assistance to the grand jury whenever his services will be helpful.

3. CRIMINAL LAW. *Appeal. Evidence. Prejudice.*

In a trial for murder it was not reversible error to admit the testimony of a witness, in reference to the angle at which certain bullets entered into a post or wall in the room in which the killing occurred, where such testimony was immaterial, and the question of accused's guilt was not dependent upon the direction or angle of the bullets, but upon the question as to whether he or some other person fired the fatal shot.

4. CRIMINAL LAW. *Evidence. Photographs.*

A photograph may be introduced in evidence after it has been shown by preliminary testimony that it is a true and faithful

representation of the place or subject as it existed at the time of the commission of the crime.

5. SAME.

It is necessary that a photograph offered to be introduced in evidence should be practically instructive as evidence, and whether it is so, or whether it has been sufficiently verified, is a preliminary question to be determined by the judge presiding at the trial.

6. APPEAL. *Ruling on evidence. Photographs.*

Where a photograph of a part of the house in which the killing occurred was excluded by the trial court, but was not sent up as an exhibit on appeal for the inspection of the supreme court, its exclusion cannot be reviewed.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Ed Le Barron was convicted of murder and appeals. The facts are fully stated in the opinion of the court.

Tally & Mayson, for the appellant.

At the very threshold of this investigation we find that the correctness of the action of the court is challenged in overruling the motion of appellant to quash the indictment returned against him. The testimony conclusively shows that both the county attorney and the district attorney were in the grand jury room while that body had the case of appellant under investigation. In our judgment, the evidence abundantly shows that the presence of those gentlement in the grand jury room largely influenced the jury in the finding of the indictment. In fact, the conclusion seems almost inescapable that but for the presence of the district attorney and county attorney in the grand jury room no indictment would have been returned. The grand jury is a very important arm of the court, and except for the rules and regulations prescribed by the court and the law for its government, it has a right to discharge its duties in such manner as it sees proper, consistent with the due performance of the

duty it owes to the public service. It has always been considered highly improper for the prosecuting officer to interfere, intermeddle with, or to urge the grand jury to return a bill of indictment against any person. We take it that the position could not be challenged that the district attorney or county attorney has no business in the grand jury room, except when called upon by that body for information touching any matter that may be presented in the manner required by law. Section 6 of chapter 6 of the Code of 1875, provides that the district attorney "shall attend the deliberations of the grand jury only whenever they may be required by the grand jury, and shall give the necessary information touching such case in order that the same may be presented in the manner prescribed by law." All Codes subsequent to that of 1857 have identically the same provisions.

See section 214, Code of 1871; sec. 256, Code of 1880; sec. 1556, Code of 1992; and sec. 1663, Code of 1906. It is true that section 4 of chapter 112 of the Act of 1910, creating the officer of county prosecuting attorney, provides that he shall represent the state and appear for the state in all matters coming before the grand jury of his county;" but assuredly the county attorney has no greater power conferred upon him than the law confers upon the district attorney, as he is a subordinate officer and we would take it that when the statute says he shall appear before the grand jury his duties are prescribed and limited by the several statutes heretofore cited for the government of district attorney's, and consequently he can give information when called upon, touching the law of the case, and not prosecute supposed defendants before the grand jury while their cases are being investigated, as he would parties who have indictments preferred against them, in a trial before a petit jury.

We think the views above expressed are in accord with those announced by this court in *State* v. *Coulter*, 61 So. 706. We respectfully submit that the fourth assignment

of error is also well taken. The testimony of the witness, Scharbrough, clearly invades the province of the jury. It was for the jury to say and conclude as to the relative positions of the several parties and the angle in which the bullet went.

It was shown by the testimony of a witness that a correct photograph or photographs were made of the house in which the tragedy was enacted and as well as of the adjacent structure and building. The appellant sought to introduce these photographs in evidence after having made the preliminary proof that the same were correct representations, but the court declines to permit the same to be introduced. This was clearly erroneous.

The universal opinion is that photographs may be used as secondary evidence on the theory that objects which they represent or delineate, cannot themselves be placed before the jury. The rule is universal so far as we have been able to find that photographs, when shown to be correct, and represent objects and surrounding circumstance which throws light on any of the matters under investigation, are properly admissible in evidence. In fact, it appears to us that such testimony would be above as valuable as could be adduced and it is universally agreed that all mankind can comprehend better any matter when the same is addressed to the eye rather than the understanding. One can very often get a better idea from photographs or pictures of any object at a moment's glance than they could by reading a whole volumn of testimony descriptive thereof. What the witness says about the relative positions of objects is secondary evidence, then why not have a correct delination by photograph, which testimony is certainly as valuable and can be more readily understood? It seems that the photographs are admissible in evidence in both civil and criminal cases wherever secondary evidence is admissible. *Baustian* v. *Young,* 75 Am. St. Rep. 462, and monographic note beginning on page 468 where the subject of ad-

missibility of photographs in evidence is practically exhausted. We, therefore, submit that the errors committed on the trial of the cause in the court below are such that it ought to be reversed, remanded and a new trial awarded.

R. D. Lainer, for the appellant.

The district attorney, under section 1663, of the Code of 1906, is required to attend the deliberations of the grand jury "whenever he may be required by the grand jury," etc. This is the only license or authority for his presence there at any time, and then only as an adviser of the grand jury as to the law covering the case under investigation.

Section 4, of chapter 112, of the Acts of 1908, being the original Act creating the office of county prosecuting attorney for this state in defining the duties and prerogatives of this purely statutory officer, among other things makes it his duty "to represent the state and appear for the state in all matters coming before the grand jury for his county." But section 5, of chapter 253, of the Acts of 1912, amendatory of chapter 112, of the Acts of 1908, expressly takes away from this officer the duty, or right even, to "appear before the grand jury." He is by the latter act only authorized to "represent the state in all matters coming before the grand jury of his county. We do not understand it to be the policy of this state in its administration of the criminal law to permit either the prosecution or the accused to be "represented" in the grand jury room, nor is it the policy of our law to permit the state to be "represented" there. To hold that under the Act of 1912, chapter 253 thereof, the county prosecuting attorney is authorized to "represent" the state in matters coming before the grand jury for investigation, then the act confers upon him a greater power than is given to the district attorney under the law, for he, the district attorney, can only appear as an

adviser of the grand jury. We must look to chapter 253, of the act of 1912, and to that alone for the powers, duties and prerogatives of the county prosecuting attorney, and if that act conferred upon him the right to appear in the grand jury room, even during the deliberations of that body, he appears there as an advocate of the state, with all the privileges and prerogatives of an advocate; and this we understand to be contrary to the policy of our law. We are aware that this court has held, in the case of *State* v. *Coulter,* 61 So. 706, that the county prosecuting attorney has this right to appear in the grand jury room during its deliberations, and that this is his duty, and while we have no desire to be placed in the attitude of differing with this court in its construction of the law, yet we feel constrained to present to the court our construction of the law creating the office of county prosecuting attorney and limiting and defining his powers and duties, in so far as the same may have bearing on the case now under consideration.

Should this court adhere to its ruling in the Coulter case above cited to the effect that the mere presence of the county prosecuting attorney in the grand jury room while that body is deliberating, and before vote taken on the finding of an indictment, does not vitiate an indictment so found, then we submit that inasmuch as both the district attorney and the county prosecuting attorney were undisputably in the grand jury room while the grand jury was deciding this case by their vote, under the rule as laid down in the case of *State* v. *Coulter,* above cited, their presence there at that time was fatal to any indictment as voted on and returned, and this motion to quash should have prevailed. Mr. Justice PRICE, in the case of *Blau* v. *State,* 34 So. 153, in reversing that case on motion to quash the indictment, referring to the grand jury, uses this language: "We must keep 'that body' pure; its findings unaffected by power, fear, sympathy, or public sentiment. In that way only can it protect the

rich, the poor, the humblest and the greatest in the land, alike."

We refer the court to the following cases: *Durr* v. *State,* 53 Miss. 427; *Welch* v. *State,* 68 Miss. 341, 8 So. 673; *Wilson* v. *State,* 18 So. 225; *Blau* v. *State,* 82 Miss. 517, 34 So. 153; *State* v. *Coulter,* 61 So. 706.

The third and fourth assignment of error may be considered together. The witness, Scarborough, was permitted, on his direct examination, to give his opinion as to the angle in which the bullet which struck the post or wall travelled after it left the gun. It was not shown that the witness knew where the person who fired the shot stood when the shots were fired; he did not qualify as an expert, and his testimony was purely an opinion and was improperly admitted. *Foster* v. *State,* 70 Miss. 755, 12 So. 822; *Temple* v. *State,* 62 So. 429; Criminal Law, Cent. Dig., sections 1048-1050.

The action of the court in refusing to allow the introduction of the photograph of the scene of the killing, offerred in connection with the testimony of the withness Garraway, was error. The photograph was properly identified, and the witness testified that it correctly protrayed the scene at the time of the shooting. The photograph was offered for the purpose, among others, of demonstrating to the jury that the witness Sellers, from where he said he was at the window in John Cooley's house, could not have seen what he said he saw at the time of the shooting. The appellant was entitled to this evidence, and to have it submitted to the jury for their consideration.

Frank Johnston, for appellee.

It appears that the district attorney and the county prosecuting attorney were in and out of the grand jury room during the term of the court and one or the other of them was present several times in the grand jury room while this particular indictment was being investigated

and considered. It appears that these officials were properly in the grand jury room with the full consent and acquiescence of the grand jurors. It also appears affirmatively and expressly from the evidence submitted to the court on the motion to quash that there was not any impropriety in any degree on the part of the district attorney or the county attorney. I will briefly call the attention of the court to the rule on this subject. "Although in some jurisdictions the prosecuting attorney is not allowed in the grand jury room, the general rule is that he may be present before the grand jury to assist in the examination of witnesses, to advise as to the admissibility of evidence and the proper mode of procedure, and to give general advice on questions of law." 20 Cyc. of Law., 1338, par. 8.

Among the many decisions of the courts holding this rule are the following: *Shoop* v. *People,* 45 Ill. App. 110; *United States* v. *Kilpatrick,* 16 Fed. 765; *In re Federal District Attorney,* 7 Fed. 3925. In *State* v. *Gonzalas,* 26 Tex. 197, it was held by the court on appeal that it was improper to quash an indictment on the ground that the person who acted as district attorney was present in the grand jury room, where it does not appear that he was present at an improper time or exercised an improper influence.

In *Kimbrough* v. *State,* 132 Ala. 8, 31 So. 567, it was held that the official prosecuting attorney who appeared before the grand jury which returned the indictment would not vitiate the indictment, although acting under an invalid appointment. The general rule that I have stated that the district attorney may be in the grand jury room and that his presence will not affect the validity of the indictment, where it appears that no improper influence was used on the grand jurors, is announced in the following cases: *Blevins* v. *State,* 68 Ala. 92; *Bennett* v. *State,* 62 Ark. 516; *Gitchell* v. *State,* 146 Ill. 175. It was also held in the Iowa case of *State* v. *Coloski,* 92

Iowa 498. It was also held by the supreme court of the state of Kentucky in *Frankman* v. *Comm.*, 105 Ky. 237.

It was also held in *State* v. *Adams*, 40 La. Ann. 745. The Pennsylvania court held the same doctrine in *Comm.* v. *Bradney*, 129 Penn. St. 199. I refer also as sustaining this rule to *United States* v. *Cobband*, 127 Fed. 713. The rule is applied to the attorney general by the Missouri court in *State* v. *Syllivan*, 110 Mo. App. 75. I respectfully submit that there is nothing in the utterances of this honorable court that is contrary to this doctrine. This court has laid down a different rule in regard to unauthorized persons in the grand jury room. *Dunn* v. *State*, 53 Miss. 525; *Welch* v. *State*, 68 Miss. 341; *Wilson* v. *State*, 70 Miss. 595.

I respectfully submit to the court that the ruling of the trial court in denying the motion to quash the indictment was perfectly proper.

The testimony of Scarborough about the length of the building is immaterial and inconsequential. He was asked if he could state the angle of the bullet, and he expressly said that he could not, and then he was asked what direction the bullet took, and his answer was: "This direction." He seemed to have indicated in some manner in the lower court the direction that the bullet took, but the record does not show what direction the bullet took. But this whole matter was immaterial and unimportant. It is impossible in any view of this case to attach the slightest importance to the testimony of this witness about the bullet holes.

Mr. Garraway was put on the stand and produced two photographs, which are termed in the record exhibits one and two. Mr. Garroway states that these photographs were to be regarded as the front of the house and the window. Mr. Garroway expressly stated that photograph number one did not show one-third of the house of Cooley. That they were taken by an Eastman Kodak, three and one-fourth by five and one-half inches. Mr. Garroway said the kodak was too small to take all the

house. Photograph number one which did not represent all the house, was excluded by the court over the objection of the defendant. Mr. Garroway then said that photograph number two represented practically all of the house except a little that was not included in the negative. It showed the window and also the window upstairs. On the preliminary examination of these photographs the district attorney made the following statement in open court: "I have no objection to the defendant offering photograph number two in evidence which shows practically all of the house." The court then told the jury, at defendant's request, not to regard the statement made by the district attorney.

It is unnecessary for me to go into the question in respect to the admissibility of photograph number one. There is no question about the photograph number two, for the district attorney would have made no objection to its introduction in evidence. I will, however, make the following observation in regard to the rule of law on this point. There is always a preliminary examination and investigation made by the trial court as to the authenticity and reliability of the photograph offered in evidence. It is universally held that a photograph, to be competent evidence, must be shown to be a true and correct copy of the object involved in the controversy. There are a number of cases decided on this point which it is unnecessary for me to cite to the court. It is also well settled and established that whether a photograph is sufficiently verified is a preliminary question to be determined by the judge, who presides at the trial. 17 Cyc. of Law, 415-416, and note 7, 8, and 9. The court in deciding this preliminary question was not open to review on appeal.

The Massachusetts court has laid down the rule that whether a photograph is verified, is a question of fact and not to be subjected to review on appeal. *Honton* v. *Morse,* 162 Mass. 414; *Comm.* v. *Morgan,* 159 Mass. 375; *Plair* v. *Pellus,* 118 Mass. 420.

REED, J., delivered the opinion of the court.

Appellant was convicted of murder and sentenced to the penitentiary for life.

The action of the circuit court in overruling the motion of appellant to quash the indictment against him is assigned as error. The presence of the county prosecuting attorney and the district attorney in the grand jury room, during the time that the charge against appellant was being investigated and deliberated on, was a ground in the motion to quash.

It appears that both officers were present before the grand jury while the case was under investigation. The district attorney was there when the bill was voted on. The county attorney could not state whether or not he was present when the vote was taken. It is shown that neither officer attempted in any way to influence the finding of the grand jury, nor did either of them express opinion on question of fact, or weight or sufficiency of evidence in the case. They were present for the purpose of giving general advice and instruction in the jurors' procedure and the law, and to assist them in the examination of witnesses. Neither of the attorneys participated in the deliberations of the jury, and there is no evidence showing injury or prejudice.

It is made the duty of the county prosecuting attorney by statute (section 5, ch. 253, of the Laws of 1912) "to represent the state in all matters coming before the grand jury of his county." He was therefore properly before the grand jury. The indictment in this case was not in any way rendered invalid by reason of his presence. *State* v. *Coultor,* 61 So. 706, 44 L. R. A. (N. S.) 1142.

Now in reference to the district attorney being present in the grand jury room during its investigation and deliberation in this case: It is stated in Encyclopedia of Pleading & Practice, vol. 10, p. 399, that:

"The prosecuting attorney is the legal adviser of the grand jury in respect of the manner of its proceeding, and may be present and assist it by his counsel. But he can act only as adviser and has no right to exercise any manner of control over its actions."

In the case of *State* v. *Coulter, supra,* referring to the duties of the district attorney in assisting the grand jury, we said:

"It is certainly the duty of the district attorney to render assistance to the grand jury whenever his services as an attorney representing the state will be helpful. As prosecuting attorney, he should be ready and willing at all times to aid the grand jury in their deliberations, and should go before them for that purpose, and a grand jury, desiring to fully investigate the offense under consideration and to make a correct presentment, will desire the presence of the district attorney and his advice and general help. Of course, he should not be in the room at the time the jury is deciding the case by their vote."

We find a clear statement of the law, touching the presence of prosecuting attorney before a grand jury and his duty to render assistance in cases being investigated, in 20 Cyc. 1338, as follows:

"Although in some jurisdictions the prosecuting attorney is not allowed in the grand jury room, the general rule is that he may be present before the grand jury to assist in the examination of witnesses, to advise it as to the admissibility of evidence and the proper mode of procedure, and to give general advice on questions of law. But he cannot participate in the deliberations or express opinions on questions of fact or as to the weight and sufficiency of evidence, or attempt in any way to influence the finding. While it seems to be very generally regarded as the better practice, and the grand jury has a right to require that the prosecuting attorney shall retire from the room during its deliberations, and in some

jurisdictions his presence is expressly forbidden by the statute, the mere fact that, with the consent of the grand jury, he is present while the jurors are deliberating or voting on a charge, will not constitute such an irregularity as, in the absence of a showing of injury or prejudice to the accused, will invalidate an indictment."

In *United States* v. *Terry* (D. C.), 39 Fed. 355, it was decided that:

"The mere fact that the district attorney was present during the expression of opinion of the grand jury upon the charge in the indictment, and during their voting thereon, is at most an irregularity, which, in the absence of averment of injury or prejudice to defendant, is a matter of form, and not of substance."

In *Commonwealth* v. *Bradney,* 126 Pa. 199, 17 Atl. 600, it was decided that if there was no participation on the part of the district attorney in the deliberations of the grand jury, or no effort by him to influence their finding, his mere presence in the jury room during their deliberations is not good ground for quashing the indictment. Judge CLARK, delivering the opinion of the court in this case, said:

"The district attorney is the attendant of the grand jury; it is his duty as well as his privilege to lay before them matters upon which they are to pass, to aid them in their examination of witnesses, and to give them such general instruction as they may require. But it is his duty during the discussion of the particular case, and, whilst the jurors are deliberating upon it, to remain silent. It is for the jury alone to consider the evidence, and to apply it to the case in hand; any attempt on the part of the district attorney to influence their action or to give effect to the evidence adduced is in the highest degree improper and impertinent. Indeed, it is the better practice, and the jurors have an undoubted right to require, that he should retire from the room during their deliberations upon the evidence and, when the vote is

taken, whether or not an indictment shall be found or a presentment made. In the absence, however, of any participation in the deliberations of the jury or effort on his part to influence their finding, we do not think that the mere presence of the commonwealth's officer in the jury room would be good ground for quashing a bill; no case has been called to our attention which carries the rule to this extent."

We commend the clear and full statement made by Judge CLARK of the duty and conduct of the district attorney in his attendance upon the grand jury and in his assistance in their work. We find there is no showing in this case of injury or prejudice to appellant by reason of the presence of the district attorney in the grand jury room. While it is a better practice for him not to be in the room while a vote is being taken, the mere fact of his presence will be considered as an irregularity. The motion to quash was properly overruled.

We find no reversible error in the admission of the testimony of one of the witnesses, in reference to the angle in which certain bullets entered into a post or wall in the room in which the killing occurred. This testimony was entirely immaterial in the case. The question of appellant's guilt was not dependent upon the direction or angle of the bullets, but, as shown by the whole evidence, it was only one of identity—whether the fatal shots were fired by appellant or a man called Oscar Johnson. As the testimony was immaterial and could not affect the issue in the case, it is unnecessary in this consideration to determine whether or not such testimony, if material, would be competent.

Appellant contends that the court erred in refusing to admit a photograph purporting to show a part of the house in which was located one of the state's witnesses at the time of the shooting. The counsel for the state objected to its admission because the photograph showed only a small portion of the building. It appears that

two photographs were in the hands of the witness. The photograph offered in testimony by appellant is called Exhibit No. 1. Another photograph was in the hands of the witness called Exhibit No. 2, and he stated that it represented nearly all of the house. No objection was made by the district attorney to appellant's offering photograph No. 2 in evidence, but it was not offered. The court would not admit photograph No. 1. It appears to be the law that a photograph may be introduced in evidence, after it has been shown by testimony that it is a true and faithful representation of the place or subject as it existed. As to the admissibility of a photograph, we quote as follows from Jones, Commentaries on Evidence, vol. 3, sec. 581:

"It is a constant practice to receive as evidence pictures and drawings of objects which cannot be brought into court, after these have been proved to be accurate representations of the subject. In like manner photographs are often admitted, when the proper preliminary proof as to their exactness and accuracy is offered. They are of the same character of evidence as diagrams and pictures drawn by hand; not necessarily carrying the same degree of probative force, but still of the same character; not in themselves evidence at all, but representing to the eye what the witness declares was the real appearance of the thing at the time he saw it. Diagrams, drawings, and photographs are resorted to only because the witness cannot with language as clearly convey to the minds of the court and jury the scene as the light printed it on the retina of his own eye at the time of which he is testifying.

It is necessary that a photograph offered to be introduced should be practically instructive as evidence, and whether it is so, or whether it has been sufficiently verified, is a preliminary question to be determined by the judge presiding at the trial. 17 Cyc. 415.

In the case at bar we do not see that the trial court erred in refusing to admit the photograph, Exhibit No.

1. The original photographs, which were in the hands of the witness when he was being examined, were not made exhibits to the record in this case and not sent up to us for our inspection. We have not therefore seen the photographs, and we cannot say, after a personal examination thereof, that the court erred in refusing to admit in evidence the photograph marked Exhibit No. 1.

We have considered all of the other assignments of error in this case and do not find any reasons for reversal in any of them.

Affirmed.

MISSISSIPPI SAWMILL CO. v. DOUGLAS.

[65 South. 885.]

1. COUNTIES. *Board of supervisors. Timber sale. Estoppel. By deed. Grounds. Laws* 1898, *chapter* 41. *Laws* 1904, *chapter* 124.

A board of supervisors cannot be bound by agreements made by individual members of the board, but can bind itself only by an order entered upon its minutes after a legal session.

2. ESTOPPEL. *By deed. Grounds. Laws* 1898, *chapter* 41. *Laws* 1904, *chapter* 124.

Where a defendant holding a ninety-nine year lease of sixteenth section lands, but not owning the timber thereon, in good faith executed a warranty deed of the timber to complainants' predecesor, and after the defect of title was discovered, without consideration, conveyed her leasehold interest to another defendant, who for their joint account purchased all the merchantable timber on the land from the board of supervisors who were authorized by Laws 1898, chapter 41, and Laws 1904, chapter 124, to sell the merchantable timber. In such case on complainant's payment of the amount paid to acquire the paramount title, equity will decree that the title obtained by defendants inured to the benefit of complainant, and will decree that defendants convey such title to complainant.

3. SAME.

In such case complainant can sue for breach of warranty.

APPEAL from the chancery court of Lawrence county. HON. R. E. SHEEHY, Chancellor.

Suit by the Mississippi Sawmill Company, against R. J. Douglas, and others. From a decree for defendant, complainant appeals.

The facts are fully stated in the opinion of the court.

Green & Green, for appellant.

Fraud being admitted by the demurrer, it must be overruled. Under the allegations of this bill, it appeared that Mrs. Buckley, being the warrantor in a timber deed, under which appellant claimed, with intent to defraud appellant, made a colorable conveyance to her brother, under which they acquired a deed from the board of supervisors to the timber with the intent thereby of defeating the prior conveyance of the timber by Mrs. Buckley and under said colorable conveyance, sharing the profits of the scheme, whereby a warrantor would be able to escape the effect of his warranty and yet hold the property.

The conveyance to that end is averred to have been fraudulent, and this is admitted by the demurree. That being true, the demurrer should be overruled. See *Hamilton* v. *Lockhart,* 41 Miss. 479; *Hanson* v. *Field,* 41 Miss. 714; *Rollins* v. *Thompson,* 13 S. & M. 525; *Stovall* v. *Clayton,* 5 S. & M. 20, Mr. Justice CLAYTON; *Niles* v. *Anderson,* 5 How. (1841), 386; Mitsfords Pleading, 239-298; *Hurd* v. *Smith,* 5 How. 562, 1841. 4 J. C. Rep. 199; 5 Id. 60.

Appellant became vested with the right under appellee's warranty deed to acquire the timber upon a sixteenth section. *Dantzler Lumber Company* v. *State,* 53 So. 1; *Cassedy* v. *Jackson,* 45 Miss. 407; *Houston* v. *Association,* 80 Miss. 31; *Fink* v. *Henderson,* 74 Miss. 8; *Southern Plantations Co.* v. *Kennedy Heading Co.,* decided March 10, 1913; *Jefferson Davis County* v. *Lumber Company,* 94 Miss. 537; *Warren County* v. *Gans,* 80

Miss. 76; *Edward* v. *Hillier,* 70 Miss. 807; *Kaiser* v. *Earhart,* 64 Miss. 492; *McInnis* v. *Pickett,* 65 Ib. 354; *Bramlett* v. *Roberts,* 68 Ib. 325; *Kaiser* v. *Earhart,* 64 Miss. 492; *McInnis* v. *Pickett,* 65 Miss. 354; see, also, *Cassedy* v. *Jackson,* 45 Miss. 407; *Houston* v. *Association,* 80 Miss. 31; *Wade* v. *Barlow,* 51 So. 662; *United States Government of Calloway* v. *Finley, et al.,* 12 Pet. 264, 9 L. Ed. 1079; *Holloway* v. *Miller,* 84 Miss. 781, 36 So. 531; *Dyer* v. *Britton,* 53 Miss. 279; *Coopwood* v. *McCandles,* 54 So. 789; *Kirkpatrick* v. *Miller,* 50 Miss. 421; *Green* v. *Irving,* 54 Miss. 455.

Under appellee's warranty deed any acquisition of the estate conveyed inured to appellant. Under the admission of the demurrer, Mrs. Buckley has made a colorable conveyance to defeat the warranty which she gave appellant's predecessors in title and has, under conveyance from the board of supervisors, been vested in truth with title to that which she heretofore conveyed to appellant.

Under these circumstances, this title so acquired, at once inured to appellant's benefit. *Edwards* v. *Hillier,* 70 Miss. 807; *Kaiser* v. *Earhart,* 64 Miss. 492; *McInnis* v. *Pickett,* 65 Miss. 354; *Bramlett* v. *Roberts,* 68 Miss. 325; *Southern Plantation Co.* v. *Kennedy Heading Company, supra.*

It may be contended that the *Jackson Naval Stores Company* v. *Tootle,* controls here, but we respectfully submit that the question here presented was not there involved and that if the warrantor acquires title from the board of supervisors, that title inured to the warrantee, even though it be in virtue of conveyance of timber upon sixteenth section land. Appellee acquiring the timber with full notice of contract of appellant to purchase, became bound by that contract and holds the timber as trustee.

The bill avers that after the termination of the so-called sixteenth section litigation a contract was made between

appellant and the board of supervisors whereunder they agree to sell to appellant in virtue of the prior deed made to it, the timber upon the land in question and that after this contract had been made and with full notice of it, appellee procured the board of supervisors to make him a deed thereof and that he purchased subject to appellant's rights is manifested by the conveyance itself. Its recitals condemn his rights. Appellant had a valid contract of purchase with the board of supervisors, which contract conferred upon appellant the right to have a conveyance made by said board to it and when, with knowledge of such contract, appellee attempted to acquire that which had already been sold, he necessarily acquired it subject to the rights of appellant. That this contract was made between appellant and the board of supervisors is admitted. That it was valid, we do not think can be successfully disputed, especially by one who has made a warranty deed to that which we were purchasing, to us, and who had breached the warranty by failing to convey that which was called for and thereafter acquiring it in conjunction with another. So that, in the instant case, purchasing with full notice of our rights, we respectfully submit that R. J. Douglas became a trustee for appellant of that which appellant had purchased of the board of supervisors, when said Buckley purchased from said board, well knowing of the rights of appellant, he became thereby a trustee *ex maleficio* and should convey to appellant.

This brief was prepared before the case of *Southern Plantation Company* v. *Kennedy Heading Company* was decided, and that decision, we respectfully submit, is on all-fours with the contention herein by appellant, and is necessarily decisive of this controversy in favor of appellant.

Wherefore, we respectfully urge upon this court that our rights guaranteed under the Federel Constitution have been impaired and that we should be protected therein.

Wherefore, we respectfully submit that the judgment of the court below should be reversed and the cause remanded with leave to appellees to answer, or if not, and the cause should be affirmed upon a technical point, that appellant be given leave to amend.

Luther E. Grice, for appellee.

We submit that this instrument was and is unlawful and a nullity, conveying no timber and no rights. *Naval Stores Co.* v. *Tootle,* 96 Miss. 486; *Moss Point Lumber Company* v. *Harrison County,* 89 Miss. 448; *Warren County* v. *Gans,* 80 Miss. 76.

The first point laid in the brief of opposite counsel is, "the bill alleging fraudulent conveyance for the purpose of defeating rights vested, which fraud was admitted by the demurrer, the demurrer must be overruled.

On this point let us say that fraud is a question of law; and while all the allegations of fact made in the bill are admitted by the demurrer, yet if those alleged facts do not amount to a fraud on appellant, as a matter of law, then fraud is not admitted by the demurrer. A demurrer admits allegations of fact, but not conclusions of law. *Partee* v. *Kortrecht,* 54 Miss. 66; *Patterson* v. *Ingraham,* 23 Miss. 87; *Spears* v. *Cheatam,* 44 Miss. 64.

As to the second point in counsel's brief, we say that the lessee of sixteenth section land has no commercial interest or right in or to the timber on the land to enjoy or convey from the board of supervisors. This court has not held in any former case, nor even so hinted. But, in any event, the deed from Mrs. Buckley to Meyer cannot be construed as having been made with any intent or purpose to convey any such "right." Counsel insists that the case of *Southern Plantation Company* v. *Kennedy Heading Company, supra,* is on all-fours with their contentions for appellant and is decisive of this controversy in its favor.

I may well take issue with them on this assertion and in support of myself invoke the same line of reasoning

which counsel employed in their effort, earlier in their able brief, to bar me from any benefit on account of the decision in the case of *Naval Stores Co.* v. *Tootle, supra.* Referring to that case, in advance of my brief, counsel quote at length from the opinion of the court (as they say; but, on examination I find that they do not quote a single syllable from the opinion of the court, but merely set out, *in toto,* the reporter's statement of the facts of the case), and they say that "the court did not have before it, at that time any connection with reference to the right upon the part of the lessee or his vendee, under section 4702 to acquire the timber upon the land from the board of supervisors" etc. I may say that the case of *Southern Plantation Company* v. *Kennedy Heading Company,* like *Naval Stores Company* v. *Tootle,* was a suit on breach of warranty. The court did not have before it the contention now made in the year 1906, after the law with reference to the sale of sixteenth section timber by boards of supervisors to sell the timber which the deed purported to convey.

In that case Mr. Justice SMITH, for the court, said: The fact that the deed on its face shows that a grantor's title is defective is immaterial in so far as the grantee's right to recover for a breach of warranty is concerned. This is the necessary effect of the holding in *Naval Stores Company* v. *Tootle,* 96 Miss. 486, though this point was not expressly passed on by the court. Moreover, it is not true that simply because the deed described the land as sixteenth section land that it thereby disclosed that appellant had not the right to dispose of the timber for commercial purposes, since such a right could have been lawfully acquired by it. Section 4702 of the Code.

In the case at bar the deed by Mrs. Buckley disclosed that she had not the right to convey the property described, since, under the law then in effect, she was not permitted to acquire such a right. Counsel lays great

stress on *Wade* v. *Barlow,* 54 So. 662. We say that was another suit on breach of warranty and had no application to the case at bar. I am unable to see in that decision a single point having any bearing on the case at bar. The same thing is true of the other cases cited by counsel in which the measure of damages on breach of warranty was the chief point treated.

In conclusion, referring to the specific grounds laid in the demurrer, let me say: First, there is no equity on the face of the bill; second, the bill is incomplete and insufficient in that various and sundry deeds therein referred to as exhibits to, and parts of, the bill are not annexed or attached to and filed with the bill of complainant. We must here insist, as we insisted in the court below, that the bill of complainant is demurrable on the ground, alone, that some of the most material "exhibits" to the bill are not actually exhibited in the bill. The alleged order of the board of supervisors and the alleged deed to R. J. Douglas in pursuance of said order, for instance, are necessary, we submit to be set out in the bill. The alleged contract between appellant and the attorneys for the board of supervisors for the purchase and sale of the timber, if in writing, should be shown. Third, the bill is argumentative in form, and in substance states no ground for complaint or relief.

We repeat, appellant has never been vested with any right in the timber in controversy, as the bill itself shows. Hence no allegation of fraud can amount, in law, to any injustce to appellant.

COOK, J., delivered the opinion of the court.

Briefly stated, the bill of complaint filed in this case alleges that Mrs. Buckley, one of the deefndants, on May 5, 1899, being the owner of a ninety-nine year lease of certain sixteenth section lands situated in Lawrence county, executed a warrnaty deed by which she conveyed to Henry Myer "all timber and timber-like trees" grow-

ing on said land, and that, by regular mesne conveyances complainant succeeded to the rights and privileges first conveyed to Henry Myer. It is further stated in the bill that in 1910 Mrs. Buckley executed and delivered to her brother, R. J. Douglas, the other defendant, a deed of conveyance of her leasehold interest in the said sixteenth section lands, for the purpose of vesting the title in her brother; that this deed to her brother was without consideration, and was made in furtherance of an agreement between Mrs. Buckley and her brother that the brother would purchase from the board of supervisors all the merchantable timber growing on said land for the joint account of herself and her brother. It is alleged that R. J. Douglas did secure from the board of supervisors a deed to the merchantable timber growing on said lands. The bill also alleges that complainant with the knowledge of Mrs. Buckley and her brother at the time she made the deed to her brother, had already agreed with the attorney of the board of supervisors upon a contract to purchase the merchantable timber on said lands, and that the conveyance of the leasehold interest to Douglas and the purchase of the timber by him was all for the fraudulent purpose of preventing complainant from buying the timber from the board of supervisors, which Mrs. Buckley had conveyed to complainant's predecessor in title. The bill prays that the deed from the board of supervisors to R. J. Douglas be canceled, and that the title to the timber on said lands be vested in complainant, or that the court, by its decree, compel Douglas to convey the timber to complainant upon payment by complainant to him of the amount paid to the board of supervisors for a deed to the timber. A demurrer was interposed, mainly upon the ground, that there was no equity on the face of the bill. The demurrer was sustained, and appeal granted to settle the principles of law involved in the case.

It is the contention of appellant that the title to the timber which Mrs. Buckley attempted to convey to com-

plainant's predecessor in title should be treated as having vested in Mrs. Buckley when she entered into the above-mentioned agreement with her brother and when her brother obtained title to same from the board of supervisors. In other words, when Mrs. Buckley, by indirection, secured the legal title to the timber she had conveyed, her title thus secured inured to the benefit of her grantee, and equity would vest the title in complainant. It is insisted by appellees that Mrs. Buckley did not own the timber growing on the land when she executed her warranty deed to same, could not obtain title to same, and her deed to same was void *ab initio*. We will reverse the order, and first consider appellees' contention in support of the demurrer.

First, it is insisted that the arrangement alleged to have been made by complainant with the attorney of the board of supervisors, whereby the board was to sell the timber to complainant, was merely a tentative agreement between attorneys, and had no binding force upon the board of supervisors. This position is undoubtedly sound. The board of supervisors cannot be bound by agreements of this character, even if made by the individual members of the board, because the board can only bind itself by an order entered upon its minutes at a legal session of the board. However, we do not understand that complainant takes a contrary view of this question. As we understand the allegations of the bill of complaint, the averment concerning this agreement is made solely for the purpose of showing that Mrs. Buckley and her brother knew that complainant was taking steps to secure the legal title to the timber Mrs. Buckley had attempted to convey, and that they forestalled this effort by "beating complainant to it."

It is claimed by complainant that this action by Mrs. Buckley and her brother will not be tolerated by a court of good conscience, and we do not understand it to be insisted that any legal or binding contract had been made with the board of supervisors.

Next, it is said by appellees that Mrs. Buckley made the warranty deed to Henry Myer in perfect good faith, but under an erroneous conception of the law, that she could lawfully convey the merchantable timber on the lands, and because of this erroneous conception of the law Mrs. Buckley's deed was absolutely void, and she is not now under any legal, or equitable obligations to her grantees who had parted with their money under the same misconception of the law.

This is not a suit upon a breach of warranty, but a bill in equity based upon a warranty of title which the warrantor did not possess at the time the conveyance was executed, but which title the warrantor had secured before the filing of the bill. Mrs. Buckley in good faith attempted to convey the timber to Henry Myer, and Henry Myer and his successors in good faith paid for what they believed was a title to the timber. It was subsequently learned that the original warrantor, Mrs. Buckley, did not own the timber conveyed, and it is alleged in the bill that she combined with her brother to secure the title, but instead of conveying same to complainant as she was in good conscience bound to do, she attempts to put the title in her brother in order that complainant may be prevented from getting what it had paid for and what she had guaranteed to its predecessor in title.

Appellees rely on *Naval Stores Co.* v. *Tootle,* 96 Miss. 486, 51 So. 801, and *Southern Plantations Co.* v. *Kennedy Heading Co.,* 61 So. 166, to support their contention that Mrs. Buckley's warranty was a nullity and that she incurred no obligation thereby. In *Naval Stores Co.* v. *Tootle, supra,* the court uses this language:

"The sale of this timber by Tootle was a nullity, and there was a breach of the warranty made by him at the very instant it was made."

Nevertheless, the court held that he was liable for breach of warranty. The fact that his deed was a nullity

did not absolve him from making his warranty good. That case was a suit for damages for a breach of warranty, and the court used the language quoted in answer to the contention that plaintiff had not been evicted. It was held that plaintiff did not have to wait for an eviction from public lands in order to entitle him to damages for breach of warranty. This point alone was the subject of decision, and we do not think there is anything in that case in any way touching the questions presented by the record in the present case.

The case of *Southern Plantations Co.* v. *Kennedy Heading Co., supra,* does not offer any comfort to appellees, and if it has any bearing upon the questions presented by the record now before the court, it may be construed against appellees' general views of the law of the present case, especially the observations of the court upon the third point made by appellant.

We believe that the fact that we are dealing with sixteenth section lands and the timber growing thereon has but little significance in the proper solution of the principles of law here involved. It is true that Mrs. Buckley's deed to Myer, in so far as it undertook to convey the timber growing on the lands other than the pine timber, was ineffectual to accomplish its intention, but it does not follow that she could subsequently acquire the right to sell all the timber and set up her after-acquired title to defeat her warranty. By chapter 41, Laws 1898, boards of supervisors in counties having control of sixteenth section lands were authorized to sell merchantable pine timber growing thereon, and Mrs. Buckley, when she executed the deed to Henry Myer, could have bought from the board of supervisors that class of timber. By chapter 124, Laws 1904, the power of the board of supervisors to sell timber on sixteenth sections was broadened by empowering the boards to "sell the merchantable timber of any and all varieties." By these two acts and by the provisions of the Code of 1906 Mrs. Buckley

is alleged to have acquired all the merchantable timber on the lands in question by using her brother as a receptacle of the title.

The simple question is, Will a court of equity, looking through forms, decree that the title to the timber thus obtained to the benefit of complainant, and to this end further decree that the legal title shall be placed where it belongs? As before stated, the bill alleges that Mrs. Buckley conveyed the timber in good faith, believing that she had a right to do so, and appellant accepted the deed and paid the price under the same belief. It seems to us that good faith and good conscience require that a court of equity grant the relief sought by the bill. There is no conceivable reason why Mrs. Buckley should not be required to carry out her contract to vest complainant with a perfect title to the property for which she received the agreed price, whenever it became possible for her to do so. This appears to be common honesty; and, while it is true, complainant might sue for breach of warranty, we are unable to agree to the proposition that that is the full measure of his rights. When the warrantor acquires an outstanding paramount title, it cannot be used to defeat the title of the warrantee, but will inure to the benefit of the warrantee. This is a familiar principle of law and needs no citation of authorities.

Our books are full of cases announcing the rule of law, but we will cite but one, a case dealing with the purchase of an outstanding title in the government.

In *Wade* v. *Barlow,* 99 Miss. 33, 54 So. 662, it was held to be a well-established general rule that where the purchaser has been put in possession, he cannot afterwards acquire an outstanding title in the United States and set it up in apposition to the vendor. In that case the title conveyed was in the United States, and of course the vendor could not have made a valid deed—the deed was a nullity, and no title passed, and yet the vendee was not permitted to set up a title obtained from the government

to defeat a suit for breach of warranty—and it was held that nothing could be recovered by way of offset, except the actual money paid for the paramount title. Turning this rule about, we can see no reason why Mrs. Buckley could acquire the paramount title and set it up to defeat her own contract, and continue to enjoy the benefits of the paramount title. When Douglas is paid the amount it took to buy the paramount title, she and her codefendant should be compelled to convey the title to her warrantee.

Reversed and remanded.

WICKER *v.* STATE.

[65 South. 885-514.]

1. CRIMINAL LAW. *Trial. Instructions. Assault and battery. Prosecution.*

In a prosecution for assault and battery, it was error to give an instruction for the state that "if the jury believed from the evidence beyond a reasonable doubt that the defendant provoked the difficulty with an insult, although prosecutor struck the first blow, then you should find the defendant guilty, provided you believe that the defendant struck prosecutor with his fist, and threw him to the ground," because it takes away from the jury the right to determine whether such words were or were not a sufficient excuse or justification for the assault and battery made by prosecutor upon defendant, under Code 1906, section 1501.

2. ASSAULT AND BATTERY. *Prosecution. Instructions.*

In a prosecution for assault and battery it was error for the court not to grant to the defendant an instruction asked for by him "that insulting words do not constitute an assault, and if the jury believe from the evidence beyond a reasonable doubt that the prosecutor struck the defendant the first blow, and afterwards defendant defended himself with no more force than was necessary to ward off the attack, as he had a legal right to do, then the jury must find the defendant not guilty.

APPEAL from the circuit court of Smith county.

HON. W. H. HUGHES, Judge.

R. O. Wicker was convicted of assault and battery and appeals.

The facts are fully stated in the opinion of the court.

T. J. Wills, for appellant.

Insulting words, no matter how violent and menacing they may be, do not constitute an assault at common law. "Mere words or menaces do not, of themselves, constitute an assault, and consequently mere threatening language and abuse, however violent in its character, unaccompanied by any overt act of hostility, is no legal provocation for assault and battery." 2 Am. & Eng. Ency. of Law (2d Ed.), page 957 and notes cited thereunder. In May's Criminal Law (3d Ed.), page 204, the rule is thus laid down: "Mere words, however menacing, it seems long to have been universally agreed, do not amount to an assault. Though the speaking of the words is an act, it is not of such importance as to constitute an attempt to commit violence." It is not "violence begun to be executed." Consequently, mere words can never constitute a justification for an attack on the person using them.

Insulting words at common law do not constitute an assault, and a person attacked as a result of an insult given has the right of selfdefense. And under the common-law rule, appellant having used insulting words towards the prosecuting witness, Wardell, had the right to strike back in self-defense, and would not have been guilty of the crime of assault and battery if no more force was used than was necessary to repel the attack made upon him, and the record in this case shows that appellant used no more force than was necessary to ward off the attack made upon him by Wardell.

The law in this state with reference to assault and battery is the same as that enunciated by the common law.

See *Smith* v. *State,* 39 Miss. 521. It is true that section 1501 of the Code of 1906, permits the giving in of evidence of insulting words used by a person as an excuse and justification for an assault and battery and leaves it with the jury to say whether the insult was sufficent to justify the assault and battery, but this section does not change the common law as to what constitutes an assault and battery, but only mitigates the offense when committed in the heat of passion aroused by the use of insulting words.

That insulting words do not constitute an assault, even under section 1510 of the Code, is shown by the very full and sound reasoning in the case of *Evans* v. *State,* 44 Miss. 762, where SIMRALL, justice, in rendering the opinion on page 773, says: "Be that as it may, there is no principal of criminal law better settled, none more necessary to the peace of society, and the safety of human life, than that threats, however deliberately made, do not justify an insult and battery, much less the taking the life of the party making them." And this opinion was rendered at a time when article 366 of the Code 1857, page 731, was in force, and is identically in its language with section 1501 of the Code of 1906.

We submit to the court, that insulting words do not constitute an assault and battery, and do not take from the person, giving the insult, the right of self-defense and especially when no more force is used than is necessary to repel the attack.

The instruction given by the state did not correctly state the law; the three instructions asked by the defendant and refused correctly stated this principle of law and it was an error for the court to refuse to so instruct the jury.

Frank Johnston, for appellee.

The question involved in the case is, whether this insulting epithet was an excuse or justification for the blow

that Wardell struck Wicker. The trial judge instructed the jury in effect, that if the defendant provoked the difficulty with an insult, although Wicker struck the first blow they should find the defendant guilty.

The instruction for the defendant holds the contrary of this doctrine—that no insulting words would justify an assault and battery and if Wicker struck the first blow, that Wardell had a right to strike back.

Section 1501 of the Code of 1906 is as follows: In trials for assault and battery, or for assault, the defendant may give in evidence, in excuse or justification, any insulting words used by the person on whom the assault or assault and battery was committed, at the time of the commission thereof, towards the defendant, and the jury may consider and determine whether such words were or were not a sufficient excuse for or justification of the offense committed."

The statute clearly provides that the defendant may give in evidence an excuse or justification for any insulting words used by his adversary, and such statute leaves it to the jury to decide whether such words were or were not sufficient justification for the offense.

Section 1501 of the Code of 1906, is a precise reenactment of section 1428 of the Code of 1892, and was expressly decided in *Barr* v. *State,* 21 So. 131. The circuit court refused to instruct the jury that no insulting words would justify an assault and battery. This court held that this statute applied to the case, and the insulting words did constitute a justification or excuse for the blow, and that this matter was to be determined by the jury. I respectfully submit to the court that the question of the construction of the statute is so clear that it really needs no judicial construction or interpretation. The statute is clearly a modification of the rigor of the common-law doctrine in the subject, which does not follow the doctrine that no language, no matter how intollerable, could justfy an assault and battery.

There is an Alabama statute, section 4900 of the Code of 1876, which is identically the same doctrine as the Mississippi statute. The same construction was given to the Alabama statute as was given to the Mississippi statute by this honorable court. The Alabama court said that their statute was intended to modify the rule of the common law, which never permitted insulting words to justify an assault. The same was announced in *Priors' case,* 77 Ala. 56-60, and the application of the statute was limited by the court to cases af assault and battery.

A similar statute was so constructed in *Spignor* v. *State,* 103 Ala. 30, in which the court said that the language should unquestionably be left to the jury to decide whether abusive language was used. In *Hodgins' Case,* 89 Ga. 761, the court held that insulting words justified a blow in return. In the civil case of *Tucker* v. *Walters,* 78 Ga. 232, the court held that the words should be left to the jury. In *Murphy* v. *State,* 97 Ga. 75, the trial court said, in its charge to the jury: "Now in this matter the law makes you supreme," that is in deciding upon the insulting words. The Georgia court in passing on this construction of the statute said, that "the ancient common law on the subject had been completely superceded by statute."

I respectfully submit that the case should be affirmed.

COOK, J., delivered the opinion of the court.

At a former day of this term this case was affirmed, but in looking over the record we are unable to give a reason for the affirmance. Appellant was tried on an affidavit charging him with an assault and battery, if we ignore the averment that the assault and battery was "feloniously" made, which we think it proper to do. The evidence shows that appellant called the man assaulted "a damn liar," whereupon the man to whom this epithet was applied struck appellant, and appellant returned the blow, and a general fist fight ensued.

At the request of the state this instruction was given by the court:

"If the jury believe from the evidence beyond a reasonable doubt that the defendant provoked the difficulty with an insult, although Wardell struck the first blow, then you should find the defendant guilty, provided you believe that the defendant struck Wardell with his fist, and threw him to the ground."

We think it was error to give this instruction, because it takes away from the jury the right to "determine whether such words were or were not a sufficient excuse or justification" for the assault and battery made by Wardell upon the defendant. Section 1501, Code of 1906.

The court also erred in refusing to give this instruction requested by defendant, viz:

"The court charges the jury, for the defendant, that insulting words do not constitute an assault, and if the jury believe from the evidence beyond a reasonable doubt that Wardell struck the defendant the first blow, and afterwards defendant defended himself with no more force than was necessary to ward off the attack, as he had a legal right to do, then the jury must find the defendant not guilty."

For the errors mentioned, the suggestion of error is sustained, the judgment is reversed, and the cause remanded.

Reversed and remanded.

CITY OF CORINTH *v.* SHARP.

[65 South. 888—64 South. 379.]

1. MUNICIPAL CORPORATIONS. *Organization. Code* 1906, *section* 3004. *Applicability. Ordinances. Enactment. Constitution* 1890, *section* 53-71. *Validity. Proof of passage.*

Under Code of 1906, section 3404, providing that the chapter on municipalities shall not apply to any existing municipality to which the law did not apply in 1892, unless adopted by a vote of the electors, the general municipal statute relating to the passage of ordinances do not apply to the city of Corinth, which under its charter (Acts 1884, chapter 403), was given special authority to enact ordinances.

2. MUNICIPAL CORPORATIONS. *Ordinances. Constitution* 1890, *section* 53-71.

Constitution 1890, section 53-71, providing for the recording of the ayes and nayes on questions and requiring all bills to have titles does not apply to municipal ordinances but only to acts of the legislature.

3. MUNICIPAL CORPORATIONS. *Ordinances. Validity.*

An ordinance of a municipality, which fully expresses its purpose and was enacted under a special charter, which authorized the city council to make and establish rules for its own government and to appoint the time for its meetings, is not invalid because it was not numbered, or because there was no title; or because the records did not show that it was reduced to writing and passed by a yea and nay vote, where it was undoubtedly adopted by a majority of the council.

4. MUNICIPAL CORPORATIONS. *Ordinances. Validity.*

It was no valid objection to a municipal ordinance because it was not shown to have been published, where there is no provision in the charter requiring the publication of ordinances.

5. MUNICIPAL CORPORATION. *Ordinances. Validity. Proof of passage.*

Where the proof in a case contains an extract from the minutes of the city, which were duly signed by the city clerk and the clerk and the charter gives the council the authority to appoint a clerk to register its proceedings and ordinances and it appears that the ordinance was duly registered by the clerk, and the copy from

the book where the ordinance is recorded plainly shows that it was adopted, the time of its passage, and the page of the record. Its enactment and record was sufficiently established.

APPEAL from the circuit court of Alcorn county.

HON. CLAUD CLAYTON, Chancellor.

Will D. Sharp was charged with a violation of an ordinance of the city of Corinth, and on the hearing in the circuit court he was acquitted; the ordinance under which he was tried being held to be invalid, and the city appeals.

The facts are fully stated in the opinion of the court.

Lamb & Warriner, for the appellant.

We respectfully submit that there is only one important question involved in this appeal, and that is, regarding the caption or title to the ordinance; in other words, Does sec. 71, of the Constitution of Mississippi, apply to ordinances adopted by the governing bodies of municipalities?

So far as we have been able to ascertain, this exact question has not been answered by this court, but the courts of other states have held, we believe without exception, that Constitution provisions of this kind do not apply to municipal ordinances. In the case of *Richards* v. *Town of Magnolia,* 100 Miss. 249, as well as in many other Mississippi cases, the court has had occasion to discuss the question of titles to ordinances. But we do not think these cases are in point here for the reason that the municipalities, whose legislation was involved, were governed by the general state law, and not by a special charter. Before citing authority in support of our views of the law relating to this question we wish to discuss briefly the case of *Sample* v. *Verona,* 94 Miss. 264, because it seems that it was on account of this decision, that the court below held the ordinance to be invalid. In the *Sample case* this court held that section 71 of the Constitution was mandatory, and not merely

directory, regarding laws passed by the legislature. The argument was made, as is shown by brief of counsel in the *Sample case,* that section 71 is merely directory. In answer to this argument, Judge WHITFIELD, who wrote the opinion of the court, said: "In respect to constitutional provisions of this kind it is said in 26 A. & E. Enc. of L. (2nd Ed.), page 572: 'In Ohio the peculiar doctrine is maintained that the provision is merely directory to the legislature, giving the courts no power to declare an act invalid because violative thereof, and the California court held the same way under a former Constitution of that state. But it is somewhat difficult to conceive how any expressed constitutional limitation on the power of the legislature can be regarded as directory only, and certainly such provisions are everywhere else deemed to be mandatory, requiring the courts to pronounce all statutes invalid in violation thereof. Manifestly the provision of our Constitution is mandatory in this regard; and so, also, is section 3406 of the Code of 1906 as to municipal ordinances.' "

The court in the Samples case does not say that section 71 of the Constitution applies to municipalities. But does say that section 3406 of the Code applies to municipalities. We are not interested in section 3406 of the Code because it does not apply to Corinth as we will hereinafter point out. Certainly this court would not have held that section 71 of the Constitution applies to municipalities without even mentioning a large number of cases from other courts holding to the contrary, cases containing similar constitutional provisions. We know, of course, that this court does not have to follow the courts of other states, but at the same time we do not believe that this court would decide a case directly contrary to the great weight of authority without so much as even referring to such authority.

This question of titles to municipal ordinances is discussed in 28 Cyc. 378, where it is said: "The provision

commonly found in the legislative article of recent state Constitutions that no bills shall be passed containing more than one subject which shall be clearly expressed in the title, has been consistently construed by the courts to have no application to municipal ordinances and by-laws. Unless, therefore, there is some charter or statutory provision requiring it, no title need precede an ordinance; or if a title is superscribed, an error in it will not vitiate the ordinance; nor will duplicity in the body of the ordinance invalidate it."

There is a large number of cases cited in support of the text in note 86, page 378, 28 Cyc. We called special attention to the case of *City of Tarkio* v. *Cook*, 120 Mo. 1, 41 Am. St. Rep. 678. In this case the court says: "The constiutional provision that no bill shall contain more than one subject, which shall be clearly expressed in its title (Const. Art. 4, sec. 28), of which it is claimed the ordinance in question is violative, was intended to apply only to state legislation, and has no application to ordinances of this city. The article treats exclusively of the legislative department of the state, and the first section declared: The legislative power, subject to the limitations herein contained, shall be vested in the Senate and House of Representatives, to be styled the General Assembly of the State of Missouri. Municipal legislation is thus clearly excluded. 1 Dillon on Municipal Corporations, section 47."

In the note at the top of page 684, 41 Am. St. Rep. it is said that constitutional provisions relative to the title of laws passed by the legislature do not apply to city ordinances. *People* v. *Wagner,* 24 Am. St. Rep. 141; *State* v. *Baoile,* 21 Am. St. Rep. 413. An exhaustive note on this subject is found at page 192 of 24 (1912-C) A. & E. Ann. cases, and we respectfully invite the court's attention to the same.

Other decisions supporting our contention could be cited but we will not burden this brief with them. We

have not found any case wherein it is held that a constitutional provision of this kind applies to municipalities. We come now to the sectons of the Code, 3404, 3405, 3406 and 3407, which the court below held to be applicable to ordinances of the city of Corinth. All we wish to say in this regard is that Corinth does not operate under the Code chapter on municipalities, but operates under a special charter. This being the fact, these sections cannot apply to Corinth because they are not enumerated in section 3441 of the Code of 1906, or in Acts 1910, where those sections of the Code which apply to all municipalities in the state are enumerated.

At pages 352 and 353 of 28 Cyc. a discussion of the subject of enactment of municipal ordinances is found. It is there said: "Municipal bodies usually adopt or recognize parliamentary law as their rules of order and proceedings. Yet the courts, unless prositively required by express statutory provision, will not annul or invalidate an ordinance enacted in disregard of parliamentary rules, provided the enactments are made in the manner required by these statutes." Non-compliance with merely formal requirements in the manner of enacting an ordinance is generally considered by the courts as no grounds for declaring it void. Indeed any form of words signifying clearly the will of the governing body that a by-law exists which the corporation was competent to enact, has been held to be sufficient. But this will not be so held when matters of substance are ignored or disregarded by the body. Yet every reasonable intendment of record will be made by the courts in order to give validity to an ordinance which is within the municipal powers.

"Defects in the form of the enacting clause have often challenged the attention of the court with an almost unanimous modern tendency to support the ordinance, *'ut magis val eat quam perat?'* In a few cases judgment has gone against an ordinance because the enact-

ing clause was wholly lacking or actually defective in recitals. But the very great weight of authority favors the ignoring of formal defects and the sustaining of by-laws wherever implication and presumption will permit, without violating any recognized rule of law." Publication for ordinance. Since there is no statute or charter provision requiring ordinances of the city of Corinth to be published we do not think there is any merit in the holding of the court below that the ordinance in question should have been published. Regarding the publication of ordinances it is said in 28 Cyc. 359: "The courts of America hesitating between the common-law doctrine that neither writing nor publication is necessary to the validity of a municipal ordinance, and the intuitive and reasonable aversion of a free people to considering as law anything not generally known or officially formulated and promulgated, have brought the law on publication of ordinance into confusion and discord that seems irreconcilable. In the absence of any statutory requirement, the prevailing doctrine seems to be that publication is not an essential requisite of a valid ordinance, but that it may be enforced before publication or without it, but not without vigorous dissent and protest from courts of repute, especially where the ordinance is penal. And even when publication is prescribed, it has been held that the statutes are, merely directory although the weight of authority is that they are mandatory. In some instances this difference of holding is attributable to the phraseology of the statutes; while in others the severity of the penalty seems to have influenced the courts. We respectfully invite the attention of the court to the cases cited in note 19, page 359 of 28 Cyc.

The ordinance is valid in every respect because it is not governed by the constiutional provision herein discussed nor by any of the Code sections. Since Corinth operates under tis own special charter these Code sec-

tions cannot apply. We submit that the court below erred in not allowing this ordinance to be introduced in evidence.

E. C. Sharp, for appellee.

As the record in this case stands, we think that the case of *Richards* v. *Town of Magnolia,* 100 Miss. 249, warrants the affirming of this decision. It is contended in the brief of appellant that Corinth operates under a special charter chapter CCCCIII of the Acts of 1884, but nowhere in the record is it shown that the city of Corinth did not come under the Code chapter as provided for by the Code of 1892.

In the *Richards case, supra,* the court said: "If any municipality failed to do this (decline to come under the Code chapter on municipalities of the Code of 1892), it became subject to the Code laws. Nothing in this record shows that the town Magnolia declined to come under the Code chapter, and this court will presume, in the absence of such showing, that the town is under the general law of the state."

The record in this case is in the same attitude and the court will indulge in the presumption, there being no evidence to the contrary, that the city of Corinth is under the general law of the state. The other question raised herein has been passed upon so often by this court and it has been decided each time that the statutes in regard to the enactment of ordinances by muicipal boards were mandatory, that I do not care to go into a discussion of those cases. And under the record before the court we respectfully submit that the judgment of the lower court should be affirmed.

REED, J., delivered the opinion of the court.

An affidavit was made before the mayor of the city of Corinth charging appellee with assault and battery, in violation of an ordinance of that city. On the hearing

in the circuit court, the ordinance which appellant was charged with violating was held invalid, and he was acquitted.

We give below the entries on the minute book of the city of Corinth for the year 1899, showing the passage of the city ordinance in question:

"Minutes City of Corinth, June 5, 1899, page 65. Mayor's office, Corinth, Miss., June 5th, 1899.

"The board met in regularly monthly session, called to order by Mayor Henry. President: T. E. Henry, mayor, C. W. Burgess, R. B. Hollingsworth, Dr. T. Borroum, aldermen.

"June 5, 1899, page 69.

"Be it ordained by the mayor and board of aldermen of the city of Corinth that it shall be unlawful for any person to commit an assault or an assault and battery upon another within the incorporate limits of the city of Corinth; and any person violating this ordinance shall be guilty of an offense against said city and shall be fined in any sum not exceeding fifty dollars for each offense, and shall stand committed until fine and costs are paid.

"June 5, 1899, page 77. (Minutes signed by)

"T. E. HENRY, Mayor,

"S. L. WARD, Clerk."

Appellee objected to the introduction of the ordiance and assigned the following reasons therefor:

"(1) There is no number to the ordinance.

"(2) There is no caption or heading to the ordinance.

"(3) Because it does not show that it was first reduced to writing and passed by a yea and nay vote.

"(4) Because it was never published.

"(5) Because the book in which the ordinance or purported ordinance was spread does not recite the time of passage, nor does the minute book show the adoption of the ordinance and the page thereof."

The record in this case shows an agreement by counsel that the city of Corinth operates under a special charter,

and not under the Code chapter of this state on municipalities. The charter is contained in the act of the legislature of Mississippi passed March 12, 1884, and is chapter 403 of the Laws of 1884.

It is contended by appellee, that the formalities for the enactment and record of ordinances by municipalities provided in sections 3404, 3405, 3406, and 3407 of the Code of 1906 were not complied with when the ordinance was passed. It will be seen that the objections to the ordinance are in the main, based upon the provisions of the above sections.

Appellee is wrong in this contention. The code chapter on municipalities does not apply to the city of Corinth. See section 3440, Code of 1906; section 3035, Code of 1892. It was not necessary for the mayor and board of aldermen of the city to follow the requirements of the sections referred to in enacting the ordinance. The city of Corinth received its power for local self-government, including the authority to enact by-laws, ordinances, and local laws from its charter granted by the act of the legislature. We quote from the charter (chapter 403 of Acts of 1884) to show the power delegated by the legislature relating to the city's government and to the making of necessary rules and laws:

"The legislative and contracting power of said city of Corinth shall be vested in the city council, composed of the mayor and aldermen, with power to make and establish rules for its own government; to appoint the time of its meetings, and the manner of being convened in special meetings, . . . to appoint a city clerk to register its proceedings and ordinances; . . . to ordain all needful laws and regulations for preventing and suppressing disorderly conduct in individuals, and unlawful assemblies within said city. . . . The said mayor and aldermen in council shall have power to enact all ordinances and by-laws, not inconsistent with the laws of this state, or of the United tates, which may be necessary and

proper to enforce the powers delegated to them by this charter; also to prescribe in said ordinances such fines and forfeitures for violations of said laws and ordinances as they may deem expedient not exceeding fifty dollars for each offense, and imprisonment not exceeding ten days for a single offense, and all such ordinances to repeal, or modify at pleasure."

There are no rules given in the charter specifying the mode for the enactment of ordinances. The legislature, in the charter, granted to the city the power to adopt its own rules for its own procedure and its own government. There are no limitations placed on the city in this respect. There are no prescribed formalities.

It is argued by appellant that the ordinance did not comply with the requirements of section 55 of the state Constitution, providing for the yeas and nays on questions, and section 71, requiring a bill to have a title indicating clearly the subject-matter of the proposed legislation. These constitutional provisions have no application to municipal ordinances. They are limited to state legislation. Dillon on Municipal Corporations (5th Ed.), sec. 72; *People* v. *Wagner,* 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141.

We take the following from 28 Cyc., p. 378, on the effect of constitutional provisions:

"The provision commonly found in the legislative article of recent state Constitutions that no bill shall be passed containing more than one subject, which shall be clearly expressed in the title, has been consistently construed by the courts to have no application to municipal ordinances and by-laws. Unless therefore there is some charter or statutory provision requiring it, no title need precede an ordinance; or, if a title is superscribed, an error in it will not vitiate the ordinance; nor will duplicity in the body of the ordinance invalidate it."

The municipal board was given the power by its charter to adopt its own rules of government; it is not shown

in the record of this case that any rules were adopted. The proof is wholly silent regarding this. However, if there were rules for procedure not fully followed, "a mere failure to conform to parliamentary usuage will not invalidate the action when the requisite number of members have agreed to the particular measure." McQuillin on Municipal Ordinances, par. 115. The same author, in the same paragraph of his excellent treatise on the Law of Municipal Ordinances, says:

"The action of municipal bodies exercising legislative functions should not be overthrown upon technical rules or strict construction of parliamentary law where the facts of such action can be gathered from the record."

Continuing, he says:

"In reference to the action of county boards, the supreme court of Wisconsin has timely observed: 'It will not do to apply to the orders and resolutions of such bodies nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body.' In like manner liberal construction is often applied to the action of councils in enacting ordinances."

"The mayor and councilmen, or other officers of a municipal corporation, are not usually selected because of their learning in the law, their observance of its forms, or their instruction in fine distinctions. If their action is to be subjected to rigid criticism, much of it done in good faith, and in the spirit of their defined authority, would be avoided. *Woodruff* v. *Stewart,* 63 Ala. 206, 215."

In 28 Cyc., pp. 352 and 353, we find the following regarding formal requisites in the enactment of an ordinance:

"Noncompliance with merely formal requirements in the manner of enacting an ordinance is generally consid-

ered by the courts as no ground for declaring it void. Indeed, any form of words signifying clearly the will of the governing body that a by-law exists which the corporation was competent to enact has been held to be sufficient. . . . But the very great weight of authority favors the ignoring of formal defects, and the sustaining of by-laws wherever implication and presumption will permit, without violating any recognized rule of law."

No particular form is prescribed in the charter of Corinth for expressing an ordinance. The form in this case clearly indicates the terms and objects of the ordinance. In an early New Hampshire case, *Lisbon* v. *Clark,* 18 N. H. 234, the record showed the ordinance or local law by the statement that it was "voted, to collect fines of one dollar of all persons riding or driving across the village bridge or salmon-hole bridge, faster than a walk, agreeably to an act passed January 13, 1837." In approving the form of this law, the court said:

"No particular form was prescribed by the statute in which the law should be engrossed, and there seems to be no law or custom restraining the towns from selecting such form of expression as suits them provided enough be contained to signify their will that the by-law exists, and to indicate the terms of it, and the objects to which it should apply."

The ordinance in the case at bar expresses fully its purpose. It states with clearness the misconduct condemned, makes it an offense against the city when committed within its limits, and prescribes a definite punishment. Its very words, "be it ordained by the mayor and board of aldermen of the city of Corinth," shows it was enacted by the city council, vested with authority by the charter to enact such law for proper government.

We see no merit in any of the grounds in the objection interposed by appellee. The numbering of the ordinance and the placing of a caption or heading thereon, the reducing to writing and passing by a yea and nay vote, are

formalities, not required by the charter, nor by any statute, nor by any rule, applicable. The failure to do these things will not invalidate the ordinance in this case.

Nor do we see any valid objection to the ordinance because it was not shown to have been published. There is no provision in the charter requiring the publication of the ordinance. Mr. Dillon, in his Municipal Corporations (5th Ed., vol. 2, sec. 603), says:

"In the absence of a statutory or charter provision directing that ordinances be published before they take effect, no publication is necessary, and ordinances take effect immediately without it."

This text is supported by the decision in the case of *In re Guerrero,* 69 Cal. 88, 10 Pac. 261.

The proof in this case contains an extract of the minutes of the city, which were duly signed by the city clerk. The charter gives the council the authority to appoint a city clerk to register its proceedings and ordinances. It appears that this ordinance was duly registered by the clerk. The copy in this case from the book where the ordinance is recorded plainly shows that it was adopted, the time of its passage, and the page of its record. Its enactment and record is sufficiently established.

We do not find that there has been any violation of any provision of the charter, or of any statute, or law, in the enactment of the ordinance. The court erred in sustaining the objection interposed to the introduction of the ordinance. It should have been admitted in testimony.

Affirmed.

FIRST NAT. BANK OF CANTON *v.* HESDORFFER.

[65 South. 507.]

APPEAL AND ERROR. *Acquiescence in decree by appellant. Acts constituting.*

Where complainant appealed without *supersedeas* from a decree, directing a sale of land to pay the amount due to a defendant and to apply the balance to complainant's claim, purchased the land for his own protection at the commissioners sale, which sale was ordered by the defendant pending the appeal, by such purchase complainant did not acquiesce in the decree, and did not release the errors relied on in his appeal.

APPEAL from the chancery court of Madison county.

HON. P. Z. JONES, Chancellor.

Suit by First National Bank of Cannton against Isador Hesdorffer, and others. From a decree granting insufficient relief, complainant appeals.

The appellee was a director in the First National Bank of Canton, and was a member of the discount committee of said bank. Upon his recommendation, the bank loaned the Durant Commercial Company, a corporation, the owners of which were Wm. Schilds, Mrs. J. M. Schilds, and J. Marseilles, the sum of six thousand dollars; Mrs. Schilds and Marseilles indorsing the note in blank. The appellee represented to the other directors of the appellant bank that Marseilles and Mrs. Schilds were well off and worth a good deal more than the amount loaned. The indebtedness was represented by a note extending over a period of about eleven months. Before the note fell due, the Durant Commercial Company failed. Partial payments had been made on the note, but there was still an unpaid balance amounting to two thousand, two hundred and twenty-seven dollars and fifty-six cents. There was also an overdraft of one thousand six hundred

and ninety-seven dollars and seventy-eight cents. After the failure of the Durant Commercial Company, it developed that Marseilles and the Schilds had, some time before the loan was procured from the appellant bank, executed deeds of conveyance to their property to appellee, claiming that it was for the purpose of securing an indebtedness due appellee and his brother, Ben Hesdorffer, because of their indorsement of a note of five-thousand dollars, made several years before, and long since past due and unpaid.

Thereupon the First National Bank filed a suit in the chancery court of Madison county against Isador Hesdorffer, J. Marseilles, and Mrs. J. M. Schilds, to recover the balance due said bank, alleging that Hesdorffer had procured the loan for the Durant Commercial Company upon the representation to the bank that Mrs. Schilds and Marseilles were well off, and had not disclosed to said bank, of which he was a director, the fact that he held deeds to their property, and that said deeds were therefore fraudulent and void. The bill sought to cancel said deeds and to hold the lands conveyed thereby for the balance due the bank. After the filing of the bill, an agreement of the attorneys was reached, whereby a bond was given by the defendants to answer whatever the decree of the court might be, and thus obtain a release of the property from the *lis pendens* lien, which had been fastened upon it by the filing of the bill. On the hearing, the chancellor held that the deeds to the lands of Mrs. Schilds and Marseilles were void, and directed Marseilles and Mrs. Schilds to execute quitclaim deeds to D. C. McCool, commissioner, and held, further, that these deeds should be considered as deeds of trust for the benefit of Isador Hesdorffer and Ben Hersdorffer, and directed the commissioner to sell the lands in question and pay, first the amount due the Hesdorffers and all costs, and the balance to be applied on the debt due by the Durant Commercial Company to the First National Bank, and by

that decree declared these two debts to be liens against the property in the order named. The bank, appealed to the supreme court without *supersedeas.*

While this appeal was pending, the commissioner, at the request of Hesdorffer, proceeded, in accordance with the terms of the decree to advertise the land for sale and to sell same at public outcry. At said sale, appellant appeared by attorney and bought in part of the land. The commissioner reported the sale back to the chancellor, and same was confirmed without objection from appellant. Thereafter appellee filed a plea in bar of this appeal, alleging that since the appellant had appeared and purchased part of the property advertised and sold, and had consented to the sale under the decree, and had accepted a deed to the land and paid the purchase money to the commissioner, appellant was therefore barred from further prosecuting this appeal. To this plea appellant filed a replication, setting up the fact that it had nothing to do with the execution of the decree, as the appeal was without *supersedeas,* and that the control of same was in the hands of appellee, and that upon being advised of the sale of certain property under this decree, and being advised that it was valuable property, it appeared, in order to protect its own interests, and to prevent the property from sale for a nominal price, and bid in the property at a fair price, and paid the purchase price, and received a deed. Appellant denied that it had ever received any benefit under the decree, but claimed that the commissioner had paid appellant nothing, and that it did not know how the money received from the sale of this particular property purchased by it had been applied, and that it still had a right to have the case heard on appeal on its merits. The appellee then filed a demurrer to this replication, and subsequently a motion to dismiss the appeal, on the ground that the demurrer was well taken, and the case should be dismissed, even on the statements and admissions in the replication.

H. B. Greaves, for appellant.

After consulting a number of authorities, as I have given this special plea in abatement careful consideration, I find the general rule to be this: "No litigant is permitted a review of an entire judgment, or decree, the parts of which are mutally interdependent, after he has acquiesced in its terms by enforcing it, or taking advantage of the provisions in his favor." This seems to be the rule, as arrived at by the author, after a careful review of most of the cases cited in the notes, to the case of *McCain* v. *Mullen,* reported in 29 L. R. A. (N. S.), page 1.

It will be borne in mind in this instant case that this appeal did not operate as a *supersedeas,* and that the appellant herein did not request the commissioner to act under the decree, but that all steps that have been taken in this suit were taken at the instance of appellee. That appellant has not been consulted in any transaction that has taken place since the decree was entered by the chancellor, and has received nothing from the commissioner under the decree.

It will further be born in mind that under an appeal without *supersedeas,* that the decree may be enforced at the instance of the party desiring it enforced. In this case the appellee desired it enforced—not the appellant. Again, it will be borne in mind that no advantage has accrued to the appellant in this case. That appellant simply purchased, as a third person, the land in controversy, and paid its money for said lands over to the commissioner, the distribution of which money appellant has not concerned itself with, and would not have received any of said money whatever, had same been tendered this appellant.

It is perfectly manifest, had the appellants received the entire sum of money due it, and for which this suit was brought, that their right would have been extinguished, and there would be no further necessity for an

appeal, and the plea here interposed would be good, but appellant has received nothing.

A Second Proposition: The appellant in this case assigns as error the postponement of appellant's demand to the demand of I. Hesdorffer, and his "Brother Ben," the contention of appellant being that if the conveyance to Hesdorffer could, under any sort of proposition, be considered to be a mortgage, or to have intended as a mortgage, then the act of Hesdorffer postponed his right under the mortgage to the right of appellant, and that the decree by the chancellor should have been (if the court does not take appellant's view as to the bond filed), that appellant's claim was prior to I. Hesdorffer's claim, and should have been paid before I. Hesdorffer and his Brother Ben.

Under this view of the case it was the part of wisdom for the bank to see that the land in controversy was sold for enough to at least pay their claim before anybody else's. *Parsons* v. *Ruthfors,* 84 Miss. 70; *Adam* v. *Carter,* 92 Miss. 679; *Erwin* v. *Lowery,* 7 How. (U. S.) 172; *Meaders* v. *Gray,* 60 Miss. 400; 7 How. 172, S. C. 12 Law Ed. 655; *O'Hara* v. *McConnell,* 23 Law Ed. 840; *Clark* v. *Ostrander,* reported in 13 American Decisions, 546 (S. C. Cowen, N. Y.), page 437; *McCain* v. *Mullen,* 29 L. R. A. (N. S.), p. 1; *Cassell* v. *Fogar,* 11 Mo. 207; S. C., 47 Amer. Decisions, 151.

I cannot bring my mind to accept the theory advanced in the special plea filed in this case by the distinguished counsel for appellee. In my judgment, he is entirely mistaken in the nature of the benefit which appellants have received under this decree. They have received no special benefit under the decree. The only benefit appellant has received under the decree is such a benefit that any third person might have received, whether connected with the case or not. Appellant has claimed nothing under the decree, asking nothing under the decree, and ignoring the fact that the decree existed, having appealed without *su-*

persedeas; long before land was sold relying on the many assignments of error, among them being that the court erred in not giving a judgment on the bond, and if mistaken in that, then that the court had erred in not postponing the right of Hesdorffer to appellant.

Green & Green, for appellant.

The precise question here, freed from any obscurity, is this: Can an appellant, who has purchased a part of part of the lands under the enforcement of the decree by appellee and which has received no money under the decree, be estopped to appeal to reverse the decree. Without pursuing the authorities in detail cited by appellee, we call attention to the failure of the cases cited to maintain the distinction between a judgment at law and a decree in equity, and such distinction is pointed out and emphasized in *Adams* v. *Carter,* 92 Miss. 590, *et seq.* and *Meaders* v. *Gray,* 60 Miss. 400; *Maiben* v. *Manlove,* 96 N. E. 501, *supra,* refers to judgment. So, also, *McCain* v. *Mullen,* 64 S. E. 829, citing, among other authorities, 2 Ency. Pl. & Pr. 174.

These citations emphasize the holding in *Adams* v. *Carter,* 92 Miss. 590, et seq., drawing the distinction between the rule in appeals from judgments at law and decrees in equity, and which expressly points out the reason of the rule applicable to judgments, does not apply to decrees in equity. The court further points out that the doctrine is governed in a great many states by statute (p. 591), hence where such is the case they would not be applicable here.

The confusion of authority is further illustrated by 2 Ency. Pl. & Pr., 174, 177, wherein, on page 176, it is declared that the rule is the same at law as in equity. *Adams* v. *Carter, supra,* expressly holds the contrary. And again, on page 177, the text recites: "As where a party accepts a conveyance made pursuant to the terms of a decree," citing *O'Hara* v. *McConnell,* 93 U. S. 150,

and the O'Hara case holds directly the opposite. The rule in this state is the same as that in the supreme court of the United States. The court in *Meaders* v. *Gray,* 60 Miss. 406, states: "In this case we are adopting the view of the supreme court of the United States in a similar case, *Erwin* v. *Lowry,* 7 How. 172," and this case is cited with approval in *Adam* v. *Carter,* 92 Miss. 594. *Erwin* v. *Lowry,* 7 How. (U. S.) 172, 12 L. Ed. 655. was a case in equity wherein a sale had been made under the decree and the money had been paid over to appellant under the decree, and by this the appellant was sought to be estopped to appeal, and the court held as to equity proceedings, as follows: We take the rule to be, that although a decree in equity is fully executed, at the instance of the successful party, who cannot complain of his own voluntary acts, if he does perform a condition imposed upon him before he can have the profits of the decree, although the other party derives benefit from such performance. If it was otherwise, a writ of error in such a case as the present, or an appeal in equity, might be defeated after the writ of error or appeal was sued out, or where there was no *supersedeas;* and here there was none. "Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed by the force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court on the cause being remanded to restore the parties to their rights." In the notes to this case in 12 L. Ed. 595, several cases are cited approving this rule.

In *O'Hara* v. *McConnell,* 93 U. S. 150, 23 L. Ed. 840, there was a deed made in performance of the decree, and in bar of the writ of error it was contended (23 L. Ed.

843): It is said that, after making the deed which the court ordered, the appellant is bound by it, and cannot now prosecute this appeal.

"The principal is unsound. The deed recites on its face that it was made under the order of the court. The parties must either have obeyed the order of the court, or taken an appeal and given a *supersedeas* bond in a sum so large that they were probably unable to do it."

"In no instance within our knowledge," says the court in *Erwin* v. *Lowery,* 7 How. 184, "has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed it is the duty of the inferior court to restore the parties to their rights." That was a case where the appellant received the money which by the decree he recovered of the appellee, and is, therefore, a stronger case than the presnt, as his action would seem to ratify the decree.

This line of authority shows that our court follows the supreme court of the United States upon this proposition, and this would seem to end the controversy. It is very essential that the rule of our court should be the same as that of the supreme court of the United States, for if a decree was rendered involving questions, and it is not superseded and executed, and the cause was then taken from this court to the supreme court of the United States, and the appeal was sought to be dismissed in the supreme court because of the execution of the decree, and that court overruled the motion, and if the cause was reversed, would remand to the state court for the execution of the decree in accordance with the rules of the supreme court of the United States. Hence, in this class of cases uniformity of decision is essential.

Mayes & Mayes, for appellee.

Mr. Greaves begins his brief with certain statements about the "undisputed facts." In this he is in error.

For instance, he says, as one of the undisputed facts, that "at the special instance and request of the appellee, the commissioner, D. C. McCool, proceeded to execute the decree by advertising the several pieces of land," etc. We are not aware that Mr. McCool either waited, in the discharge of his official duty, to receive a special request from the appellee, or that the appellee made any such special request, or that the commissioner would have paid any attention to any special request which the appellee might make. It was his official duty, under the decree of the court, to proceed, without request from anybody; and we believe that he did so. We do not think the point is of any special legal significance, but we want the record kept straight. That Mr. McCool, an officer of the court, was moved or guided in his official action by Mr. Hesdorffer is a proposition that we are not prepared to accept—especially as an "undisputed fact." In his official capacity, he was simply and duly carrying out a decree rendered on the bank's prayer, and at the bank's instance.

We shall now submit some authorities which go to support our view of this case. In *Carpenter* v. *Camp. Mfg. Co.* (Va., March 9, 1911), 70 S. E., 496, it is said that: "A party cannot avail himself of that portion of a decree which is favorable to him, and secure its fruits, while prosecuting an appeal to reverse, in the appellate court, such portions as militate against him. The only exceptions to the rule are where the parts of the judgment or decree are separate and independent, and the receipt of a benefit from one part is not inconsistent with an appeal from another; or where the right to the benefit is conceded by the opposite party, so that it could not be denied should the other portions of the decree granting it be reversed."

"Many authorities are cited in support of this proposition, which is consonant to reason and good faith. See *More* v. *Williams,* 29 Ill. App. 597; *Bennett* v. *Van Syckle,*

18 N. Y. 481." In 2 Cyc., on page 651, it is said that: "It is a rule well established that a party who obtains the benefit of an order or judgment, and accepts the benefit or received the advantage, shall be afterwards precluded from asking that the order or judgment be reviewed, or from denying the authority which granted it."

Many cases from a number of states are cited to sustain that proposition. We refer to these citations by that text. See, also, *Coston* v. *Lee Wilson* (Ark.), 160 S. W. 857. Also, *Turner* v. *Markham* (Cal., Nov. 7, 1907), 92 Pac. 485, citing several California cases. Also, *Owens* v. *Phosphate Co.,* 115 Ga. 768; *Trapp* v. *Off,* 194 Ill. 287; *Maiben* v. *Manlove* (Ind., Nov. 16, 1911), 96 N. E. 501; *Sontag et al.* v. *Klee et al.,* 148 Ind. 536, 47 N. E. 962; *McGrew* v. *Grayson et al.,* 144 Ind. 165, 41 N. E. 1027; *William et al.* v. *Richards,* 152 Ind. 528, 53 N. E. 765; *Stern* v. *Vert et al.,* 108 Ind. 232, 9 N. E. 137; Ewbank's Manual of Practice, sections 112, 113; Elliott's App. Procedure, sec. 408; *Haggin* v. *Montague* (Ky., May 1, 1907), 101 N. W. 893. Also, *Parr* v. *Webb* (Mont., Jan. 19, 1910), 106 Pac. 353; *Krauss* v. *Krauss* (N. Jer., June 22, 1908), 70 Atl. 305; *Kreager* v. *Warnock* (N. Y.), 81 App. Div. 150; *Thomas* v. *Booth-Kelly Co.,* 52 Ore. 534; *McKain* v. *Mullen* (W. Va., April 27, 1909), 64 S. E. 829, 2 Cyc. 651; 2 Ency. Pl. & Pr., 174; *Payne* v. *Woolley,* 80 Ky. 568; *Dunham* v. *Rendall,* 11 Tex. Civ. App. 265, 32 S. W. 720; *Tyler* v. *Shea,* 4 N. D. 377, 61 N. W. 468; 50 Am. St. Rep. 660.

In Mississippi, we have but few decisions which touch that question. The first is the case of *Meaders* v. *Gray,* decided in 1882, 60 Miss. 400. In that case it was held that the rendition of a decree in the court below against the appellee for a certain sum, and the acceptance of the sum decreed by the appellant, did not estop the appellant from appealing, in the effort to increase the size of his judgment. This court will observe that Judge CAMP-

BELL, having stated the case, said this expressly: "We decline to lay down a rule for any other stated case than that presented here." And then he proceeds to show that even that narrow case presented, the authorities were confusing, and the court was all at difference about what they really meant, only agreeing on the proposition that the bare acceptance of the money decreed by the appellant from the hands of the appellee, did not estop him to appeal. *Parson* v. *Rutherfore,* decided March, 1904, 84 Miss. 70; *Adams, Revenue Agent* v. *Carter,* decided in 1908, 92 Miss. 579.

The appellant further, in its replication, admits in express terms, that it bought the land for a speculation. If this isn't an election, what could be? They saw the glittering prize, and they grabbed it. They can't eat their cake and have it.

SMITH, C. J., delivered the opinion of the court.

Appellant had no control over the execution of the decree appealed from, and therefore cannot be said to have acquiesced in its rendition, because it was executed by the commissioner appointed for that purpose, and its purchase at the commissioner's sale was not such an acceptance of the decree as constitutes a release of errors, if any, therein. By purchasing at this sale, appellant simply protected itself against probable loss, for the reason that, had it not purchased the land, it might have been sold to third persons for much less than its value.

The plea in bar of the appeal and the motion to dismiss are both overruled.

Overruled.

MISSISSIPPI CENTRAL RAILROAD CO. *et al.* *v.* MAPLES.

[65 South. 644.]

JUSTICE OF THE PEACE. *Appeal. New parties. Substitution. Amendments.*

Code 1906, section 775, authorizing amendments so as to bring the merits of the controversy between the parties fairly to trial, does not empower the circuit court, on an appeal from a justice of the peace court, to allow the plaintiff to amend her complaint by striking out her own name as plaintiff and substituting her husband in her stead.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by J. J. Maples against the Mississippi Central Railroad Company, and others. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

H. S. Buescher, for appellant.

The court erred in permitting an amendment substituting the name of J. J. Maples as plaintiff for that of Mrs. J. J. Maples, plaintiff, after the close of all the evidence. During the progress of the trial in the circuit court, the testimony developed that suit had been brought by the wrong party, whereupon, on motion of appellee and over the objection of appellant, the court permitted the substitution of J. J. Maples as plaintiff. This substitution was no doubt permitted by the court under an erroneous interpretation of section 775, chapter 75 of the Code of 1906, reading as follows: The court shall have full power to allow all amendments at any time to be made in any pleading or proceeding of the controversy before verdict, so as to bring the merits of the controversy between the parties fairly to trial, and may allow all errors and mis-

takes in the name of any party or in the form of the action to be corrected; and the court shall require all such amendments to be made on such terms, as to cost and delay, as may be proper to prevent surprise or undue advantage. Either party may except to the decision of the court allowing or refusing amendments, and the same may be assigned for error.

This statute was enacted "so as to bring the merits of the controversy between the parties fairly to trial." The parties to the original suit in the justice court were Mrs. J. J. Maples, plaintiff, New Orleans Great Northern Railroad, Mississippi Central Railroad and Illinois Central Railroad, defendants. The justice court at no time had jurisdiction over J. J. Maples, the substitute plaintiff. He was a stranger to that court, and we contend that the circuit court had no other jurisdiction than such as the justice court had. *Glass* v. *Moss,* 1 Howard (Miss.), 519; *Crapo* v. *Grand Gulf,* 9 Smed. (Miss.), 205; *Steir* v. *Sargent,* 10 Smed. (Miss.), 154; *Schofield* v. *Penson,* 26 Miss. 402; *Richardson* v. *Davis,* 59 Miss. 15.

By permitting this substitution, which in no sense can be upheld by this court, it constitutes, as far as this substituted plaintiff is concerned, an annullment of section 702, chapter 20 of the Code of 1906, which provides, among other things, that "the circuit court shall have original jurisdiction in all actions when the principal of the amount in controversy exceeds two hundred dollars." And, also, of section 2723, chapter 73 of the Code of 1906, which provides that "justice of the peace shall have jurisdiction of all actions for the recovery of debts or damages, or personal property where the principal of the debt, the amount of the demand, or the value of the property sought to be recovered shall not exceed two hundred dollars."

By permitting the substituted plaintiff to make his first appearance in the circuit court, as was done in this instance, he was in fact permitted to bring an original suit

for one hundred and twenty-five dollars in the circuit court, thus virtually circumventing both of the statutes above referred to.

Section 86, chapter 5 of the Code of 1906, provides, among other things that in case "judgment be rendered for the plaintiff in the original suit for a sum equal to or greater than he recovered before the justice of the peace, ten per centum damages upon the amount thereof shall be included in such judgment." If instead of recovering a judgment for one hundred dollars in the circuit court, the substituted plaintiff had recovered a judgment for one hundred and twenty-five dollars (the amount of the judgment recovered by the original plaintiff in the justice court), would this substituted plaintiff have been entitled to this ten per centum damages?

While our courts have held that section 775, chapter 75 of the Code of 1906, should be liberally interpreted, this appellant can nowhere find any warrant or authority in law permitting a substitution of this character. Numerous cases may be cited where the name of one nominal plaintiff has been substituted for another, or where the form of the action has been changed, or where the holder of the legal title is made nominal plaintiff, but this court has never yet held that an entirely new plaintiff, a stranger to the proceedings in the justice court, between whom and the original plaintiff there was no privity of interest, or who was neither the successor nor the assignee of the original plaintiff, could be properly substituted.

In *Armstrong* v. *Bean,* 56 Texas, 492, the supreme court held that the filing of an amended petition substituting an entirely different plaintiff was an irregularity and could have no effect other than the filing of an original petition. In *Elliott* v. *Clark,* 18 N. H. 421, the court held that an amendment was inadmissible which introduces a different party as plaintiff. In *Fisher* v. *Pennsylvania Company,* 2 Pa. Co. Ct., 245, the court held that a record cannot be amended by striking out the name of the sole de-

fendant and substituting that of another party. The proper practice is to discontinue and bring a new suit.

A complaint cannot be amended by the substitution of entirely new parties as plaintiff. *Lubman* v. *McGraw,* 3 Wash. St. 520, 28 Pac. 1107.

An order substituting one party for another will not be made by an appellate court upon a mere suggestion. There must be proof or an admission by the adverse party of the facts claimed in order to make it proper to substitute a new party. *Kemper* v. *King,* 11 Mo. App. 116.

An appeal or writ of error taken in the name of a party after he has by assignment or otherwise lost interest in the subject-matter of litigation, cannot be amended in the appellate court by the substitution of the person upon whom such party's interest has devolved. *Weiler* v. *Long,* 13 Pa. Co. Ct. 632.

Amendments should be liberally allowed under the pleading Act of 1850, but they should be made exclusively for the purpose of reaching the merits of the controversy; an amendment therefore will be ill-advised and improper, which being allowed after the evidence is closed, substitutes instead of the plaintiff, the name of the third party who is shown by the proof to have no title to recover the thing demanded by the suit. *Show* v. *Alexander,* 23 Miss. 229. Under the statutes of amendment a complete change of parties cannot be allowed. *Rarden Merc. Co.* v. *Whitesand,* 145 Ala. 617, 39 So. 576. See *Wray* v. *Johnson,* 10 Humphreys (Tenn.) 186.

So where a plaintiff has been permitted to bring in a new plaintiff the name of the original plaintiff cannot subsequently be struck out by amendment. *Reynolds* v. *Cadwell,* 80 Ala. 232. See *Brooks* v. *Collier,* Ind. Ter. 468. And likewise where a new party defendant has been added, the original defendant cannot be struck out. *Rarden Merc. Co.* v. *Whitesand,* 145 Ala. 617, 39 So. 576.

The general rule even under the codes and practice acts, is that it is not permissible to substitute, by amendment,

a new plaintiff or defendant in place of an original sole plaintiff or defendant, except in case where there is a privity or succession of interest. 3 Cyc., page 48. Appellant therefore contends that the substitution of plaintiffs herein permitted was fatally erroneous; was in contravention of section 775, chapter 75, Code of 1906; constituted an annullment of section 207, chapter 20, Code of 1906, and of section 2723, chapter 73, code of 1906, and should cause this case to be reversed and dismissed.

Brady & Dean, for cross-appellee.

Cross-appellee contends that the court overstepped the liberality allowed in the matter of amendments, when, after all the testimony of plaintiff was in, permission was given to strike out the plaintiff, who admittedly had absolutely no title in the goods, and then and there, for the first time, bring in a totally different party, new to the litigation, who likewise had no title in the goods, and make him a plaintiff.

Such an amendment should not have been permitted; but with it or without it, cross-appellant has no case against this defendant, and the judgment was the only proper one.

A. A. Cohn, for appellee.

The court did not err when it permitted the amendment, and our supreme court has said in the case of *Miller* v. *The Northern Bank,* 34 Miss. 410, that it will not reverse a case for an alleged error in the exercise of that discretion of granting a leave to amend, unless it be manifest that the party complaining of its exercise has thereby been injured. Section 775, chapter 75 of the Code of 1906, states expressly that parties will be permitted to amend as to mistakes in name of any part of the suit. At the most, this was merely a mistake in the names and the court was perfectly correct in permitting the same. So anxious has our law been, that permits amendments of this nature, that each Code adopted by our legislators

had contained a section almost identical with the aforesaid section in the Code of 1906. Hutchinson Code 1848, pages 848-849; Code 1857, page 508; Code 1817, section 621; Code 1880, section 1581; Code 1892, section 171.

Our courts have repeatedly construed this section of the different Codes and have always permitted the parties to amend. *Denton* v. *Stephens,* 23 Miss. 194; *Montague* v. *King,* 37 Miss. 441; *Tully* v. *Herrin,* 44 Miss. 626; *Cooper* v. *Grandberry,* 33 Miss. 117; *Weathersby* v. *Sinclare,* 43 Miss. 189; *Sharp* v. *Spengler,* 48 Miss. 360; *Bloom* v. *McGrath,* 53 Miss. 249; *Dyer* v. *Britton,* 53 Miss. 270; *Duff* v. *Snuder,* 54 Miss. 708; *Green* v. *Robertson,* 3 H. 105; *Shropshire* v. *Judge of Prob.,* 4 H. 142.

There is nothing in the contention of appellees to the effect that this amendment annulled section 707, chapter 20 of the Code of 1906, relative to the jurisdiction of the circuit court in controversies where the amount exceeds two hundred dollars nor is there anything in its contention that section 2723, chapter 73 of the Code of 1906, was annulled by this amendment. This was not a new suit in circuit court, but simply the original suit appealed from the justice court, tried *de novo* in the circuit court. The mere fact that this amendment was made, does not affect, in any manner, the jurisdiction of the court, neither does section 86, chapter 5, of the Code of 1906, have any bearing on this case for the reason it was the same suit, and if plaintiff had recovered in the circuit court in the sum equal to or greater than that recovered in the justice court, he would have been permitted his ten per centum damages. This, for the reason that the suit was identical; the goods lost were the same; the parties at issue were practically the same; the issue itself was identical in both courts, namely, were the defendants liable for the loss of plaintiff's goods, and if so, which one of the defendants, and what sum?

With reference to the Mississippi case cited by appellant sustaining his contention that the amendment was wrongfully allowed and that the circuit court had no ju-

risdiction, after the examination of the authority cited by him, we are unable to see wherein the said authorities are pertinent. The case of *Glass* v. *Moss,* merely held that an offset of seventy dollars may be introduced for the first time in the circuit court in a case appealed from the justice court, which was limited in its jurisdiction to an amount not exceeding fifty dollars.

In the case of *Crapo* v. *Grand Gulf,* 9 S. & M. 205, the court held that an original suit for five dollars filed in the circuit court was not in the jurisdiction of the circuit court. In the case of *Steir* v. *Sargent,* 10 S. & M. 154, the court held that the circuit court, in cases appealed to it from the justice court, has only such jurisdiction as had the justice court. In the case of *Scolfield* v. *Pensons,* 26 Miss. 402, this court simply held that a plaintiff could not extend the jurisdiction of the circuit court by splitting up his cause of action, which amounted to more than the jurisdiction of the justice court and filed a part of said amount with one justice and the remainder of said sum due to the other justice.

In the case of *Richardson* v. *Davis,* 59 Miss. 15, held that a justice of the peace of one district, had no authority to issue a writ of replevin for property held in the possession by a defendant in another district returnable before a justice of the peace in such district. Certainly the court can easily see that the above cases have no bearing on the case at issue. It is a policy of our courts to liberally allow amendments and this is always true when the purpose of the amendment is to reach the merits of the controversy. *Shaw* v. *Alexander,* 32 Miss. 229.

In the above styled case of *Shaw* v. *Alexander,* the same question arose that arises in this case and the supreme court of this state refused to permit the amendment, for the reason that the evidence unquestionably showed that the plaintiff after the amendment had no title to the property. However, if the proof had shown that the title to the land in question was in the amended plaintiff's name, the amendment would have been allowed because the mer-

its of the controversy would have been reached by such an amendment.

COOK, J., delivered the opinion of the court.

Mrs. J. J. Maples filed suit in the justice of the peace court against the New Orleans Great Northern Railroad Company, the Mississippi Central Railroad Company, and the Illinois Central Railroad Company for damages for an alleged breach of a contract of carriage of freight. Before the trial in the justice court the suit was dismissed as to the last-named company. The trial resulted in a judgment against the New Orleans Great Northern Company and was dismissed as to the Mississippi Central Company. The New Orleans Great Northern Company appealed to the circuit court, and the plaintiff also appealed from the judgment in favor of the Mississippi Central Company. In the circuit court the case was tried on both appeals, before the judge as judge and jury. At the close of the testimony for plaintiff, the plaintiff was permitted to amend her complaint by striking out her own name as plaintiff and inserting in lieu thereof the name of her husband as plaintiff. It thus appears that this suit was begun and prosecuted in the justice court in the name of one party, and when it reached the circuit court the original plaintiff abandoned her suit, and by order of the court her husband was allowed to pick up the abandoned lawsuit and prosecute it to judgment in his own right. The circuit court thereupon proceeded to render a judgment against the Mississippi Central Railroad Company and in favor of the New Orleans Great Northern Company, reversing completely the action of the justice court in the original case of Mrs. J. J. Maples against the railroad companies.

Among other assignments of error, it is contended here that it was error for the circuit court to permit an amendment changing the plaintiff in the cause.

In *Denton* v. *Stephens et al.*, 32 Miss. 194, it was held that the pleadings might be amended by striking out one

nominal plaintiff and inserting the name of another nominal plaintiff. This case was based on the laws of 1850 (Laws 1850, ch. 4), which seemed to be broader than section 775 of the Code of 1906.

The statute referred to in that case contains this language:

"The court may at any time amend the pleadings by striking out or adding the name of any party."

However, the amendment approved in the Denton case would probably be authorized by the present statute, as practically the same question was before this court in *Jones* v. *Clemmer,* 98 Miss. 508, 54 So. 4, and an amendment of like kind was approved construing section 775 of Code of 1906.

It has been held that in suits brought by a plaintiff in his individual capacity the complaint may be amended by changing same to a suit in a representative capacity, or *vice versa.*

Our statute on amendments is very liberal, but in no case have we found that an amendment has been allowed whereby another and entirely different plaintiff was substituted for the party who had instituted the suit.

In the present case it appears that Mrs. Maples never had any contract with the defendants or either of them; on the contrary, it is shown that she was an entire stranger to the contract. She had nothing to do with the case and was an interloper, and when this was developed the case should have been dismissed. There was no error or mistake in the names of the parties to be corrected by an amendment "so as to bring the merits of the controversy between the parties fairly to trial." The amendment does not affect the parties to the controversy, but absolutely changes the parties.

We do not think the statute can be stretched to cover an amendment of the character here considered.

The judgment is reversed, and the cause dismissed.

Reversed and dismissed.

FISHER v. BROWNING *et al.*

[66 South. 132.]

1. ADOPTION. *Rights of adopted children. Inheritance. What law governs. Rules of decision. Comity. Judgment. Conclusiveness. Res judicata.*

Under Code 1906, section 542, providing, that an adopted child shall be entitled to all the benefits proposed by the petitioner to be granted and conferred in the petition for adoption, an adopted child cannot take property by descent from its adopting parents unless such right is specifically given to it in the petition for adoption and in the decree of the court in response to it.

2. INHERITANCE BY ADOPTED CHILDREN. *What law governs.*

Since the descents of lands is governed by the *lex rei sitae*, and since lands in Mississippi must descend according to the laws of Mississippi and since under the laws of this state an adopted child may not inherit from foster parents unless so specified in the petition for adoption and the decree of the court in response thereto, where a child was legally adopted in Kentucky under such proceedings as entitled it to inherit real property in that state, but which proceedings did not give it such rights in Mississippi, where its foster parents resided, in such case the adopted child had no interest in the land of its foster father in Mississippi, which on his death without natural children descended to his widow.

3. ADOPTION. *What law governs. Rules of decision. Comity.*

Under the laws of comity the courts of Mississippi are not bound to recognize the rights flowing from the statute created by adoption in Kentucky if its laws on the subject of adoption and the rights flowing from it are inconsistent with our own law on that subject.

4. JDUGMENT. *Conclusiveness. Res judicata.*

Where in a suit for partition, the widow of one of the heirs was complainant and her adopted daughter a defendant, and in that suit the widow voluntarily submitted her rights, as against such daughter, to adjudication, and the court having jurisdiction of the parties and subject-matter erroneously decreed that the adopted daughter was entitled to inherit a part of the land sought to be partitioned, from her father, such decree not having

been appealed from, and the time for appeal having expired, was conclusive and *res judicata* of that issue.

5. ADOPTION. *Adopted child. Inheritance.*

Property inherited by an adopted child goes to the child in fee simple, and upon its death the property descends according to the law of descent and distribution of this state, which would be its blood relatives.

APPEAL from the chancery court of Sunflower county.

HON. E. W. THOMAS, Chancellor.

Bill of Mary Browning and others against J. B. Fisher. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Flowers, Alexander & Brown, for appellant.

D. M. Quinn, J. Holmes Baker and *S. F. Davis,* for appellee.

OWEN, Special Judge, delivered the opinion of the court.

On the 15th day of July, 1901, Church W. Rule and his wife Lula A. Rule, who were then living and having their domicile in Sunflower county, Mississippi, and then being without children, and being in the state of Kentucky, presumably on a visit there, in Kentucky, on said date signed what is called in the record, "articles of adoption." This was a contract merely, signed jointly by Church W. Rule and his wife on the one part and the Louisville Baptist Orphans' Home, by its president, on the other part, by which Church W. Rule and his wife, Lula A. Rule, are said to have adopted a child, then about three years of age, and an inmate of said institution, named Lula May Browning. By this contract the said Rule and wife obligated themselves to adopt the said infant, Lula May Browning, "and do hereby adopt said Lula May Browning, and covenant with said Louisville Baptist Orphans' Home that said Lula May Brown-

ing shall bear from this time forward the same legal relation to them as if she had been born unto them, and were their child, especially as to such property as would descend to her were she their child." After signing said articles of adoption, Church W. Rule and his wife took the said infant to their home in Sunflower county, Mississippi, and there it occupied the relation of a child to them, and was treated by them as their child, up to the time of their deaths, respectively.

It appears that the Louisville Baptist Orphans' Home was chartered and incorporated by an act of the general assembly of Kentucky, approved January 28, 1870 (Laws 1869-70, ch. 197), and amended by an act approved January 31, 1880 (Laws 1879-80, ch. 108), and that by virtue of its charter it was invested with all the rights of parents and natural guardians of any child committed to its care, and that it was also empowered to permit any suitable person to adopt any child in its custody and control as their own child upon proper covenants in writing being executed by such persons and its president, and acknowledged or proven in the clerk's office of Jefferson county, Kentucky, as deeds may be, and by the amendment of 1880 to this charter it was provided that by the articles of adoption, when executed and recorded, "such child shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she were the child of such persons," etc. It appears also that the supreme court of Kentucky has held this act of incorporation constitutional, and that when this contract was executed it amounted there to a complete adoption, and authorized the child adopted to inherit as if it were the natural child of its parents.

We remark that the present Constitution of Kentucky has a provision similar to section 90 of our own Constitution, which forbids that any special laws shall be passed on the subject of adoption, and other things, but this Constitution of Kentucky was adopted after the act of incor-

poration aforesaid of the Louisville Baptist Orphans' Home, with a saving clause, and we do not think that it repealed that act.

On August 9, 1898, Mrs. Mary J. Rule, the mother of Church W. Rule, living in Sunflower county, Mississippi, died and left a considerable body of land, which descended on her death to her children, two of whom were then living, and to the heirs of the two of her children then dead. Mrs. Mary J. Rule was survived by one son, J. W. Rule, and a daughter, Emma. Her son, J. H. Rule, who died after she did, was survived by his widow, Mary Maude Rule, and her daughter, then an infant, Johnnie Floyce Rule, and her son, Church W. Rule, who died after his mother did, was survived by his widow, Lula A. Rule, and the adopted child, Lula May Browning Rule. On March 2, 1903, J. W. Rule, the surviving son of Mrs. Mary J. Rule, and the widows of his two deceased brothers, to wit, Mrs. May Maude Rule, the widow of John Rule, and Mrs. Lula A. Rule, the widow of Church W. Rule, filed in the chancery court of Sunflower county, Mississippi, a bill to which they made defendants Emma Rule, the surviving daughter of Mary J. Rule, an adult, and the two minors, Johnnie Floyce, the daughter of Mrs. May Maude, the widow of John Rule, and Lula May Browning Rule. The object of this bill, and its sole purpose was to partition the lands of Mrs. Mary J. Rule between her surviving son and daughter and the heirs of her deceased sons, J. W. Rule and Church W. Rule, and the bill prayed for a division of said lands of Mrs. Mary J. Rule into four parts; that is, one part might be set aside to J. W. Rule, and another part to Emma Rule; one part to the widow of John H. Rule, and her daughter, Johnnie Floyce Rule, jointly, and the fourth part to be set aside to Lula A. Rule, and the child, Lula May Browning Rule.

The bill of complaint thus filed contains the following statement, with reference to the position of Lula May Browning Rule:

"The said minor, Lula May Browning Rule was never adopted by any proceedings in court, according to the laws of the state of Mississippi, but the said Church W. Rule and his wife, Lula A. Rule, made their certain contract in writing with the Louisville Baptist Orphans' Home, bearing date the 15th day of July, 1901, executed in triplicate, and signed by said Church W. Rule and Lula A. Rule and the said Louisville Baptist Orphans' Home. By the said contract it was agreed that the said Church W. Rule and his wife, Lula A. Rule, should adopt, and they did thereby adopt, the said minor, whose name at that time was Lula May Browning, and that the said Lula May Browning should, from that time forth, bear the same relation to the said Church W. Rule and his wife, Lula A. Rule, as if she had been born unto them and were their child, especially as to such property as would descend to her if she were their child. Complainants herewith file a copy of this contract as part of this bill, and mark the same 'Exhibit A.' Complainants allege that from that time up to the time of the death of the said Church W. Rule, the said Church W. Rule and his said wife have had the care, custody, and control of said minor, and the said child is now in the care and custody of said Lula A. Rule. Your complainants are advised that by said articles of adoption, although there had been no proceedings in the courts, the said child is entitled to have a child's part in the said estate of Church W. Rule, but complainant Lula A. Rule, submits this question for decision of this court. The said Lula A. Rule is now the legally appointed guardian of the said Lula May Browning Rule; the said Johnnie Floyce has no guardian. It is asked that your Honor may adjudicate whether the said minor, Lula May Browning Rule, has an interest in said estate."

The suit in which this bill was filed is called cause No. 1100 in the record, being so numbered on the chancery court docket of Sunflower county.

The prayer of the bill, among other things, is:

"That your honor may adjudicate whether the said minor, Lula May, has an interest in said estate . . . and one of said shares to the said Lula A. Rule and her adopted minor child, Lula."

Guardian *ad litem* was appointed for the minors, including Lula May Browning Rule, and answered, submitting the interest of the minors to the protection of the court, and praying that the allegations of the bill be required to be substantiated by strictly legal proof. The chancellor rendered a written opinion, in which he held that Lula May Rule was in fact adopted by Church W. Rule and his wife, and as such adopted child inherited one-half of the estate and lands in Mississippi of Church W. Rule, and in the decree of partition set apart one of the four shares to Lula A. Rule and her adopted child, Lula May Rule. From this decree of the chancery court in the partition proceedings, cause No. 1100, there was never any appeal, and the right of appeal is barred by the statute of limitations. Church W. Rule died intestate on the 7th day of February, 1903, and the infant, Lula May Browning Rule, died on the 29th day of November, 1905. Mrs. Lula A. Rule, after the death of her husband, Church W. Rule, married the appellant, J. B. Fisher, who claims all the land as the only heir of his wife, Lula A. Rule Fisher, who had died since the death of Lula May Browning Rule, and the appellant claims that when the child died, it had no interest in the lands of Church W. Rule, and inherited nothing from him, but that if it did inherit an interest in the lands of Church W. Rule, that upon the child's death this land descended to its adopted mother, Lula A. Rule, and at her death descended to him, appellant. The bill in the present case was filed by appellees, claiming to be the brothers and sisters by the blood of Lula May Browning Rule, and claiming that as the adopted child of Church W. Rule she inherited half of his lands upon his death, and upon the death of Lula May

Browning Rule the said lands descended to them as brother and sisters by blood, and did not descend to its adopted mother, Lula A. Rule, and a decree made for appellees is appealed from to this court.

There are many questions in the case, and some of them are of very great importance and are of first impression in this court, and we have carefully and laboriously considered the same.

The statutes of descent and distribution in Mississippi make no provision for the descent of the property of adopted children. There is no law in Mississippi which gives the right of inheritance to an adopted child, except section 542 of the Code of 1906, which was copied from the previous Code of 1892, the only change being made in the statute was with reference to the court in which the petition for adoption should be filed. The principal questions presented by the record for solution are: First, was Lula May Browning Rule so adopted under the laws of Kentucky as to make her capable of inheriting the lands of Church W. Rule in Mississippi? Second, is Mississippi bound by the law of comity to recognize the *status* of adoption of a child, which *status* is created in Kentucky, and give effect to it, and to the legal rights of that *status* in Kentucky here in Mississippi, to the extent of holding that the child has capacity to inherit lands located in Mississippi? Third, if the second proposition is answered by the court in the negative, then is Mrs. Lula A. Rule and those in privity with her and claiming under her precluded, or estopped, by the decree of the chancery court made in cause No. 1100, which adjudicated that the child was adopted in Kentucky, and by virtue of that adoption it had capacity to inherit lands in Mississippi? Fourth, assuming that the child was legally adopted in Kentucky, and that the decree in cause No. 1100 was *res judicata,* then whether or not on the death of the child the property descended to its blood relatives,

strangers to the Rule family, or to its adoptive mother, Mrs. Lula A. Rule.

There can be no dispute about the fact, we think, that under the laws of Kentucky, Lula May Browning Rule was so adopted as to be capable of inheriting anything that Church W. Rule owned in the state of Kentucky. In Mississippi, unlike in the state of Kentucky, under this special act of the general assembly of Kentucky, a child may be partially adopted, or it may be completely adopted, but under the laws of the state of Mississippi it only inherits and gets those benefits and rights which are specifically given to it in the petition required in adoption proceedings, and in the decree of the court in response to it.

There can be no dispute that the descent of lands is governed by the *lex rei sitae,* and that the lands in Mississippi must descend according to the laws of Mississippi, and we, therefore, hold that the lands of Church W. Rule in this state upon his death without natural children descended to his wife, Lula A. Rule, and no interest in it descended to Lula May Browning Rule.

There are very many respectable authorities holding that adoption in one state confers no right of inheritance to lands in another state, and that inasmuch as adoption was unknown to the common law, and it being purely a statutory right, those statutes have no extraterritorial effect. See *Smith* v. *Deers, Adm'rs.,* 34 Pa. 126, 75 Am. Dec. 641; *Doe* v. *Varnell,* 6 Varn & C., 438, 6 Bing. N. C. 385; *Linger* v. *Linger,* 45 Ala. 410; *Barnum* v. *Barnum,* 42 Md. 307; *Beauchamp* v. *Bertig,* 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; *Brown* v. *Finley,* 157 Ala. 424, 47 So. 577, 21 L. R. A. (N. S.) 679, 131 Am. St. Rep. 68, 16 Ann. Cas. 778; *Shearer* v. *Weaver,* 56 Iowa, 578, 9 N. W. 907.

We recognize that the weight of authority and the trend of modern decisions is to the effect that every other state will recognize the *status* of the state creating

it, and will give effect to it just as if that *status* were created under the law of the state where it is invoked, but provided, always, that the *status* and the rights flowing from it are created by the laws of the state which are in harmony with and consistent with the laws and public policy of the state where it is invoked, and that therefore Mississippi will recognize the *status* of the child, created in Kentucky, as the adopted child of Church W. Rule, and will enforce all the rights of the child in that situation here, provided the rights flowing from that adoption in Kentucky and the laws of that state on the subject are not inconsistent with or opposed to the laws or public policy of this state on the same subject.

We repeat that under the law of comity we are not bound to recognize the rights flowing from the *status* created in Kentucky if its laws on the subject of adoption and the rights flowing from it are inconsistent with our own laws on that subject.

We do not believe, however, that this child was capacitated by the adoption in Kentucky to inherit lands in Mississippi, because the laws of Kentucky are inconsistent with and antagonistic to our Constitution and laws on the same subject, and to the public policy of Mississippi on that subject, as such public policy is found in our statutes and Constitution, and for that reason we do not believe that Mississippi is bound to recognize this adoption by contract, as it was made in Kentucky, to be valid and binding in Mississippi as to confer upon the child the capacity to inherit lands in Mississippi. Its *status* as an adopted child of Mr. and Mrs. Rule may be recognized here without recognizing its capacity to inherit lands, which is a wholly different thing. Under the charter of the Louisville Orphans' Home the adoption was a complete adoption, or no adoption at all, whilst in Mississippi, there may be an adoption without the right to inherit lands, and without the right of heirship at all. Again, the laws of Mississippi require the consent of the mother

and father, or the guardian, to the adoption, and any kind of an adoption requires the solemn sanction of a decree of the chancery court. No such thing is known to the laws of Mississippi as adoption by contract, nor can it be done by special act of the legislature of Mississippi, by reason of section 90 of our Constitution. The proceedings for adoption followed in Kentucky by the contract, etc., if pursued in Mississippi, would undoubtedly be held to be null and void, and before a child adopted even in Mississippi can inherit lands here, the jurisdictional fact must be asserted in the petition that heirship is one of the benefits to be conferred by adoption. See *Beaver* v. *Crump,* 76 Miss. 36, 23 So. 432.

Our own court in this case, in construing section 542 of the Code of 1906, said:

"This statute is wholly unlike those of most of the other states of the Union and is similar in some respects to those of only two other states, so far as we have been able to ascertain."

And in this case it was held that the adopted child could not inherit lands in this state unless heirship be one of the benefits proposed to be conferred by the petition filed for adoption.

"The adoption of this class carries with it only the specific gifts, grants, bequests, and benefits proposed in the petition."

The only way to interpret the statute of descent and distribution in Mississippi by way of adoption is that the adoption shall be made in accordance with the laws of the state of Mississippi. This is the clear public policy of our state by its Constitution, laws, and decisions, and what could not be done in Mississippi directly, to create capacity to inherit lands here, could not be done in Mississippi indirectly, and if this contract or adoption would be void under the laws of the state of Mississippi, and is inconsistent with our public policy, then capacity cannot

be given to inherit lands here by this indirect proceeding in the state of Kentucky.

We hold that Mississippi would not be bound by any law of comity to give effect to this method of inheritance of lands here where the *status* of adoption was created by a state whose laws and public policy were so inconsistent and antagonistic to our own laws and Constitution, and we hold, therefore, that Lula May Browning Rule inherited nothing of the lands of Church W. Rule in Mississippi, by reason of her so-called adoption in Kentucky.

As to the third proposition, we are of opinion that the decree in cause No. 1100 was *res adjudicata.* Lula A. Rule was a complainant in this bill and Lula May Browning Rule was a defendant, and the complainant submitted her rights to the court for adjudication. There was a question as to whether Lula May Browning Rule inherited this property, and she was therefore a necessary and proper party. The court had jurisdiction of the subject-matter and the person, and its decree was therefore, we think, *res adjudicata.* We think the authorities are too uniform and too numerous to cite that a judgment of a court in a matter within its jurisdiction, however erroneous, is final and conclusive if not appealed from. The opinion of the chancellor and his decree in cause No. 1100 was clearly erroneous, and would unquestionably have been reversed had appeal been taken to this court, but Mrs. Lula A. Rule, the complainant and adopted mother of Lula May Browning Rule, did not appeal from this decree and accepted it as binding on her, and we think that when she failed to appeal it was *res adjudicata,* and estopped her and her privies from afterwards questioning it.

The fourth proposition, we think must be decided against appellant's views. We cannot subscribe to the doctrine that an adoptive parent inherits from an adopted child to the exclusion of its blood relatives. We think that the property inherited by an adopted child goes to

the child in fee simple, and upon its death the property descends according to the law of descent and distribution of this state, which would be to its blood relatives. We are referred by counsel to the case of *Humphries* v. *Davis*, 100 Ind. 274, 50 Am. Rep. 788, decided by Judge ELLIOTT, in which Judge ELLIOTT holds that the adoptive parent inherits from an adopted child to the exclusion of the natural mother or blood relatives. The law on adoption of children is in derogation of the common law, and unless the statute of the state provides for descent and distribution from an adopted child to go to the adoptive relatives in preference to the natural relatives, we are of the opinion that the natural relatives or blood kin inherit in preference to the adoptive kin. The opinion in *Humphries* v. *Davis* follows the civil law. The civil law was pressed on this court by counsel in *Beaver* v. *Crump*, 76 Miss. 34, 23 So. 432, and this court refused to follow the civil law and adopt the views adopted by Judge ELLIOTT in *Humphries* v. *Davis*, and we think that was the correct view, and therefore hold that the property upon the death of Lula May Browning Rule was inherited by her blood brothers and sisters, and that it did not go to her adoptive mother, Mrs. Lula A. Rule Fisher.

The case will therefore be affirmed.

Affirmed.

MILLER, Special Judge (dissenting).

I cannot concur with my Brethren in this case in answering the third and fourth propositions here for solution.

I do not believe that the decree in the proceeding for partition of the lands of Mrs. Mary J. Rule in cause No. 1100, in which it is contended that the legality of the adoption of Lulu May Browning in Kentucky was determined, and also that her legal rights flowing from that adoption, gave her capacity to inherit an interest in the lands of Church W. Rule in Mississippi.

I think this decree was not *res judicata* of Lula May Browning's right to inherit the lands in Mississippi, because there never was an issue made up in that case, or joined in it, upon which the court had jurisdiction or power to make any such determination. I fully recognize the rule, as settled, of course, that the judgment of a court of competent jurisdiction, however erroneous, is final between the parties to that litigation, but I know, also, that on this much misunderstood question there are limitations upon the power of the court to bind parties to a record by way of *res judicata.*

In the case of *Charles* v. *White,* 214 Mo. 187, 112 S. W. 545, 21 L. R. A. (N. S.) 481, 127 Am. St. Rep. 674, a decision was made which best illustrates my views upon this limitation of the general doctrine announced by the majority of the court in this case, and which best sustains my view that the case at bar is an exception to such general rule, as well established as the rule itself. In that case, it is stated, quoting from the opinion of Chief Justice BEASLEY in *Munday* v. *Vail,* 34 N. J. Law, 418:

"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this, there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. . . . Third, the point decided must be in substance and effect, within the issue. . . . A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet, I cannot doubt that upon general principles such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and

it is only over those particular interests which they choose to draw in question that a power of judicial decision arises."

Where the court proceeds beyond the allegation of the pleadings and the prayer for relief, and decrees a matter between parties defendant, its judgment to that effect is void and open to collateral attack. Unless the defendants (parties) contest an issue with each other upon the pleadings between themselves and the plaintiff, or upon cross-pleadings, between themselves, the judgment will not be *res adjudicata* in subsequent litigation between them.

This limitation upon the general and much abused statement of the general rule that a court of competent jurisdiction by its judgment forever settles, by way of *res judicata,* all questions that might have been litigated between the parties is approved by every respectable court where it has been invoked, and by the supreme court of the United States.

I repeat that it is just as well settled that, unless there was an issue between the parties that, although the court had jurisdiction of the subject-matter and of the parties, its judgment as to questions outside of and beyond the issues is mere *obiter dictum,* and without power of the court to determine them and bind parties by way of *res judicata.*

The only purpose of the petition in cause No. 1100 to partite the lands of Mrs. Mary J. Rule was to divide it into four parts, giving one part to each of her four heirs, and to the heirs of those of them deceased. There never was any effort to divide the lands of Church W. Rule between his widow and the so-called adopted child. The lands of Mrs. Mary J. Rule were only divided into four parts, as they would have been if the child had not been made a party to the record. The relief asked for was to divide the lands of Mary J. Rule, and not to divide the lands of Church W. Rule, and in fact no partition of the

lands of Church W. Rule was ever made. I know the court had jurisdiction, under section 3525 of the Code of 1906, to determine every interest in the lands, and if there had been an issue in the case upon which the court could have predicated its determination that the child was so adopted in Kentucky as that it was entitled to inherit an interest in the lands of Church W. Rule in Mississippi, it would have been *res judicata,* but I repeat that judgments are *res judicata* only of those things *necessarily* and *directly* in issue, and which have been fairly heard and tried and determined. See Black on Judgments, secs. 611, 614; *Land* v. *Keirn,* 52 Miss. 341; *Shuler* v. *Murphy,* 91 Miss. 518, 44 So. 810, 14 L. R. A. (N. S.) 333, 124 Am. St. Rep. 708; *Lincoln National Bank* v. *Virgin,* 36 Neb. 735, 55 N. W. 218, 38 Am. St. Rep. 347; *Bridges* v. *McAlister,* 106 Ky. 791, 51 S. W. 603, 45 L. R. A. 800, 90 Am. St. Rep. 267.

In the case of *Shuler* v. *Murphy* one of the tenants in common had filed a petition for partition, and asserting that each of eight heirs were entitled to a share of the lands which were asked to be sold for partition, and the chancery court, with jurisdiction of all the parties, solemnly adjudicated that one of these shares belonged to one Taylor, and the lands were sold and the sale confirmed and the money ordered distributed according to the decree of the court, and the creditors of Taylor appeared on the scene and garnished the commissioner and sought to have Taylor's interest applied to their debt, and an issue was made up between Taylor's two sisters, who claimed that Taylor had sold them their interest in the land before the decree of partition was made and the creditors of Taylor; and this court held that that decree was not *res judicata* against these sisters, who were parties to that proceeding for partition, and who really and in fact owned Taylor's interest in the lands before the decree for partition was made, but that issue was not made up in the case, and they asserted no claim to it in

that partition proceeding. That case is to my mind decisive of this case by this court.

It is a mistake to assume that there was an issue disclosed by this record on the question of whether or not Lula May Browning was so adopted in Kentucky as to confer capacity upon her to inherit lands in Mississippi from her adoptive father. It never was affirmed in that petition in cause No. 1100 that Lula May Browning Rule did inherit by reason of the adoption an interest in Church Rule's land in Mississippi. The petition simply alleges, which is just as near as that affirmation was made in the petition, that Mrs. Rule "*was advised* that the child had been lawfully adopted," but, "*submitted this question to the court.*" And the court, responding, said that, inasmuch as he had been requested to decide this question of whether the child was lawfully adopted, proceeded to hold that it was so adopted, and had capacity to inherit lands in Mississippi. The matter claimed to be *res judicata* here was never affirmed on the one side or denied on the other. The child was represented by a guardian *ad litem,* who filed a mere formal answer, and affirmed nothing, claimed nothing, and denied nothing, but merely submitted the interests of the child to the court. I repeat, without an issue, and a trial and determination of that issue, the decree of the chancellor in cause 1100 on the subject of the child's capacity to inherit lands in Mississippi as absolutely void and binding upon nobody.

It will not do to say that Mrs. Rule filed the petition and herself asked to be done just what was done. That suggestion would be pertinent if an estoppel *in pais* were claimed against Mrs. Rule, but there is no predicate for an estoppel *in pais* against Mrs. Rule here, on account of her attitude assumed in that partition proceeding because that act on her part was purely voluntary and without consideration, and nobody is claiming in this case that they have acted upon it to their prejudice, and therefore

estoppel does not lie against Mrs. Rule, because its essential principle is lacking; that is, that somebody has parted with his money on the faith of her attitude, and would be injured by her assertion of a right to the lands. These blood brothers and sisters of Lula May Browning claiming these lands certainly have not been injured. The real question in the case is not whether Mrs. Rule would be estopped, which she would not be of course, but the question is, did the adjudication of the chancellor of the child's capacity to inherit lands in Mississippi become *res judicata.* I say not, because his determination of that question was without an issue in the case to rest upon.

As to the fourth proposition: I differ widely with my Brethren. I agree with the majority of the court that the adoption of Lula May Browning by contract in Kentucky did not give her capacity to inherit lands in Mississippi, for the reason stated by the court, but the logic of the court's opinion is that, whilst she was not so adopted as to inherit lands in Mississippi, yet by way of *res judicata* she was so adopted as to inherit lands in Mississippi, and, if that be true, that by way of *res judicata* or otherwise she inherited, as the adopted daughter of Church W. Rule, an interest in his land in Mississippi, then she must stand as to those lands as the adopted daughter of Church W. Rule. I hold that by that adoption she became, in truth and in fact, the child, as if of the blood, of Church W. Rule and his wife, Lula A. Rule, and upon that child's death her adoptive mother inherited her lands, and not her blood kin.

My Brethren take the view that the statute of adoption, or the *status* of adoption, however created, only had the effect of qualifying the child to inherit from its adoptive parents, and did not give the adoptive parents the corresponding right to inherit from it.

On this subject, there is almost a hopeless conflict of authority in the adjudged cases. A number of the states

hold to the view, as best expressed by one of the greatest lawyers and greatest judges America has ever known, Judge ELLIOTT, that the act of adoption in effect establishes the blood relation between the adoptive parents and the adopted child, and that the child stands as to the property of the adoptive family as if it had no blood kin from whom it has been cut off by the act of adoption, and that upon its death the property descends to its adoptive kin, that is, the property it gets in the adoptive family, and not to its blood relations. This, I think, is the more just, reasonable, and humane construction that can be given to our statute of adoption. We do not by this view take away from the child the capacity to inherit from its blood relations, or to give them the right to inherit from it as to property of its family of the blood, but, as to the property it acquires in the adoptive family, the law of descent and distribution, when it speaks of "parents" as heirs, or "brothers and sisters" as heirs, has reference to the members of the adoptive family, so far as the property of that adoptive family is concerned.

We add nothing to the law of descent and distribution by this view, and we take nothing away from the law of descent and distribution, which is, of course, aimed at and founded in the natural family relations, but we simply give a construction to our statute on the subject of adoption that its purpose by full adoption was to confer upon the child the right to inherit from its adoptive parents and give them the corresponding right to inherit from it. This room for construction is furnished by the fact that there is no law in Mississippi, that is, no statute law, which determines the right of inheritance from an adopted child at all, and the courts by decision must establish a rule that is most just and humane and reasonable and consistent with the policy of encouraging adoption, rather than discouraging it.

There is absolutely nothing in the statute of adoption in this state which compels us to take the view that the

blood relative must inherit from the adopted child rather than its adoptive relatives, and I will not give my consent to sanction a rule so unjust as the rule contended for by the majority of this court. If the child is the lawful child of the Rules they are its lawful parents. It would be monstrously unjust to suppose that the legislature ever intended by section 542 of the Code of this state to say that after the Rules had taken this little child in its tender infancy with the consent of its natural mother and father, if it had any, who had utterly abandoned it and cast it out, and by the law of adoption were absolved from all further obligation to it, and that the Rules had assumed all the obligations, at law, of father and mother, and bound themselves for its support, maintenance, and education, as they were bound if they were its adoptive parents, and bestowed upon it their affections and their care, and educated it, and then by the death of Mr. Rule it got a large estate in his lands, and upon its death those lands should go to its natural brothers and sisters rather than to Mrs. Rule, its adoptive mother, and is a rule of law and of construction of that statute, to which I will never give my consent. I am adopting the result of the rule of the civil law, from which the statute of adoption is taken. Under the civil law, the adoptive parents are its parents, rather than its natural parents. The adoption was unknown to the common law.

The view I have adopted as expressed by Judge ELLIOTT in the case of *Humphries* v. *Davis,* 100 Ind. 274, 50 Am. Rep. 788, has been affirmed by a very respectable number of the supreme courts of the states, which will be found in the briefs of counsel for appellant, and that view we think has been repudiated by the states of Wisconsin, Ohio, and Missouri, and the reasoning upon which they reached the conclusion that was reached by the majority of the court in this case I cannot approve. Of these cases holding as the majority holds in this case that

the blood kin inherit from the adopted child upon its death rather than its adoptive mother, Mr. Freemen, who has made of the American State Reports one of the greatest law publications of the day, and who was recognized as the foremost annotator and one of the foremost lawyers of his day in America, in the notes to *Van Matre* v. *Sankey,* 39 Am. St. Rep. 229, said:

"The vice of these decisions, in our judgment, lies in the fact that the courts making them gave too strict a construction to the statutes of adoption, and were unwilling to concede that such statutes had any other object than to confer the benefit of heirship to the adopting parent upon the child adopted. The purpose of these statutes we conceive to extend further than this, and, in effect, to take the child from its parents by birth, and to give it to the parents by adoption, and to create, as between it and such parents, the reciprocal rights and relations of parent and child, and to give to the former both the incidental and the direct advantages of parentage; and we, therefore, think that, upon the death of such child, intestate, and leaving an estate which by statute, vests in its parents, the word "parents," as thus used should be deemed to designate the adopting parents, rather than the parents by birth; for under the law, it is the former, rather than the latter, who occupy the relation of parent to the child at the time of its death."

With Judge ELLIOTT and Mr. A. C. Freeman, I am in hearty accord, and conceive myself to be in very respectable company.

In find that in the state of Kentucky, the supreme court of that state in the case of *Lanferman et al.* v. *Van Zile,* 150 Ky. 751, 150 S. W. 1008, adopts, in fact, Judge ELLIOTT's view. Kentucky is one of the states holding as a construction of its statutes of adoption that:

"By the event of adoption," the adopted child "becomes the legal child of the adopting parent, . . . in the same light as a child born in lawful wedlock. . . .

The estate of the natural child, which he inherits from his parents, is defeated by his death in infancy, without issue, and the property then goes back to the kindred of that parent. The adopted child, inheriting as though he were the child of his foster parent, takes subject to the same limitation; and when he dies in infancy, and without issue, the property under the statute descends to the kindred of that parent from whom he received it."

It is indeed a strange and illogical conclusion, as it seems to me, to which the majority of the court have arrived in this case; this child had its *status* as an adopted child fixed by the laws of Kentucky, under which laws, as above stated, if it had died there, as it died here, the property it inherited from Mrs. Rule would have gone to Mrs. Rule, rather than to its blood kin, and yet by way of *res adjudicata,* and otherwise, the court has given it by inheritance an interest in the lands of Church W. Rule, and yet refuses to enforce that legal result flowing from the *status* created thus in Kentucky, to wit, that upon its death without issue and intestate its property does descend to its adoptive mother, Mrs. Lula A. Rule.

The logic of the majority of the court is incomprehensible to me. If we are bound to enforce its *status* as an adopted child in Kentucky, then it seems clear to me that we ought to enforce all the legal rights of that *status* that would flow in the state of Kentucky upon its death.

It is so monstrously unjust to conceive of a man laboring and accumulating a fortune and dying and leaving it to his wife and an adopted child, and that upon its death before the death of its adoptive mother the adopted child's relatives, who had never been adopted by the adopting father and mother, and who are strangers to their blood, should take the property of the child thus inherited in the adoptive family, rather than its adoptive mother as to shock my sense of justice and fair play, and I refuse to yield my assent to any such construction of the statute of adoption.

This is a very important matter, and this case is of first impression in this court, and I have written this dissenting opinion in the hope that the legislature will, by positive statute overturn the conclusion that has been reached by the majority of the court on this subject and establish the law upon what I believe to be a just basis, and upon a basis which my Brethren, I really believe, think it ought to rest upon. As I understand, they reach their conclusion only because of the binding force of the statute, which they feel they have no power to construe as I have.

FREEMAN v. FREEMAN.

[66 South. 202.]

1. APPEAL AND ERROR. *Review. Findings of fact. Equitable proceedings. Tenancy in common. Mutual rights. Acquisition of outstanding title.*

A chancellor's decree on the facts of a case will not be disturbed when amply supported by the testimony.

2. TENANCY IN COMMON. *Mutual rights and duties. Acquisition of outstanding title.*

Where a party purchased at an administrator's sale of his intestate's land and received a deed from the administrator which was lost and the record thereof destroyed by fire and one of the heirs of the original grantee secured a deed to the land from the heirs of the administrator's intestate, such deed inured to the benefit of all the heirs of the original grantee as tenants in common.

APPEAL from the chancery court of Perry county.

HON. W. H. COOK, Special Chancellor.

Bill for partition by H. J. Preston against G. W. P. Freeman, and others. From a decree ordering partition, defendant appeals.

The facts are fully stated in the opinion of the court.

A. T. L. Watkins and *J. H. Davis,* for appellant.

It is manifest that the learned special chancellor assumed that Wm. Freeman owned the land and treated the parties as co-tenants, and as claiming from a common source, which is not shown if appellee had been in court with a stranger, armed with the muniments of title with which appellant is armed, he would stand no sort of show to recover. He must recover, if at all, on the strength of his ancestor's title and not on a supposed weakness of appellant's title, as he is manifestly trying to. This is a presumption of law attending all causes, throughout the entire proceeding, in any and all courts. It is so held as far back as 50 Mississippi, page 229; see, also, 53 So. 773, second syllabus, page 816, and many others.

If the heirs of Wm. Freeman could not recover in ejectment with a stranger, armed with the muniments of title with which appellant is armed, they should assuredly fail here, and must fail. See 42 So. 186; 41 So. 538 and 724; 44 So. 424, and many others. It was manifest error to attempt to establish Wm. Freeman's title by showing the burning of the courthouse of Perry county away back in the year 1875 or 1876, without some precedent proof that Wm. Freeman had had a deed. See chapter 91, Mississippi Code 1906. At all events he should have set out his claim of title in his pleadings, at least furnished competent proof, in the absence of a record title as against one who held a record title, as did appellant, and the appellant's answer put him squarely on notice of his claim, if the official records of the county had not.

We respectfully submit, that there is not a sentence, line, or word of competent evidence that Wm. Freeman owned and possessed the land at the date of his death; a burden that must be met before he can hope to recover, against the only legal title in existence, so far as this

record shows, and we submit that appellant should recover on the first count of his answer.

It appears without dispute or contradiction, that appellant has held the land, openly and notoriously, adversely and hostile, to all the world, beginning at least two years prior to the death of Wm. Freeman, and continuing to date; and if the holding began in the lifetime of Wm. Freeman, and was adverse to him, at his death his children began where he left off, that is, it took only ten years to perfect a title by adverse possession, in the absence of infants or persons of unsound mind, neither of which appear in this cause.

D. K. McDonald, for appellee.

In discussing the testimony and applying the law in this case, we will first call the court's attention to the contention of the defendant, G. W. P. Freeman, and appellant in this honorable court. He claims that his father gave him this land, not by any conveyance evidenced by writing, nor by acknowledging before witnesses in any manner recognized by the law, but when he was asked when he delivered the patent over to him and under what circumstances, he could not tell.

The defendant was incompetent as to the alleged gift from the deceased father on account of the statute. We will consider further his testimony. He doesn't seem to be content with his title from his father, notwithstanding his father lived upon it some twenty years and then he had claimed it for about twenty some odd years. He goes out and purchases, without consideration, seemingly, the title of the McKenzie heirs, the man that his father claimed through at an administrator's sale. This does not look very much like he was relying very much upon his gift from his father. The law does not permit one tenant in common to buy in outstanding titles or interest and thereby enjoy the benefits thereof, but assigns it to the benefit of the co-tenancy. These quitclaim deeds if

serving any good purpose, in considering this land or the title thereto inures to the cotenancy and not to any individual cotenant. See 38 Cyc. page 40; 90 Miss. 762; —— So. 987; 81 Miss. 219, 32 So. 317; 68 Miss. 714, 10 So. 37; 65 Miss. 447, 4 So. 345; 7 Am. St. Rep. 673.

We now pass to the second plea or answer of the defendant, and can't see where he can expect the court to give him title by adverse possession. On the other hand, I feel that we have made a very strong case of title by adverse possession to the land that he bought at execution sale. He seems to have permitted his sister Polly to live on and cultivate his or some of his land all of her life, however she was too good and honest to assert a claim of ownership to more than her father left at his death. If there are any of the heirs to this estate that are entitled to this land in controversy by adverse possession, it was Polly Freeman, who lived upon and cultivated some of it all her life. The defendant failed to bring his case within the law of adverse possession, and especially between co-tenants. See *Iler* v. *Ruth,* 3 How. 276; 38 Cyc. pages 21, 22 & 23. Ouster and adverse possession between cotenants. Rule stated. 3 How. 276; 38 Cyc. page 23; 69 Miss. 237, 7 So. 324; 86 Miss. 604, 38 So. 779; 79 Miss. 302, 30 So. 709; 69 Miss. 577, 11 So. 319; 69 Miss. 833, 13 So. 850; 38 Cyc. pages 25 to 34.

REED, J., delivered the opinion of the court.

Appellee filed a bill for partition of a tract of eighty acres of land in Perry county, which he averred was owned by his father, William Freeman, at the time of his death intestate. All the other heirs at law of William Freeman were made parties defendant. Appellant, a son of William Freeman, as a defendant, filed an answer to the bill, in which he denied that his father died seised and possessed of the land, and set up a title thereto in himself by virtue of deeds to him from the heirs of Alexander McKenzie, deceased. He also claimed title to the

land by adverse and hostile possession thereof for more than ten years.

It appears in the proof that William Freeman purchased the land at an administrator's sale of the estate of Alexander McKenzie some time during the years of 1866 or 1867. He went into possession of the land soon after his purchase, and it became a part of his residence property, and was occupied by him until his death in 1885. His widow continued in possession thereof until her death some years after her husband's decease. Then a daughter had the use and possession of the land until she died, which was shortly before the filing of the proceeding for partition. A deed conveying the land to William Freeman could not be found. It is in testimony that the courthouse in Perry county, containing the records in which such deed should have been recorded, was burned after the date of the sale of the land to William Freeman, and all deed records therein destroyed. The deeds under which appellant claimed title to the land were made to him by the McKenzie heirs after the deaths of his father and mother.

The chancellor, upon the hearing, decreed that the land was owned by the heirs at law of William Freeman, deceased, and ordered it sold for division of the proceeds. He also gave judgment against appellant and J. H. Overstreet, another defendant, for an amount due for timber cut and taken from the land, and allowed appellant for taxes he had advanced and paid.

The chancellor's decree as to the title of the land and as to all questions in the case was upon the facts, and we will not disturb it. In truth, his decision is amply supported by the testimony.

As appellant was an heir at law of his father, William Freeman, the conveyance of title to him by the heirs of Alexander McKenzie inured to the benefit of all of the heirs of William Freeman as cotenants.

Affirmed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1914.

LOUISVILLE & NASHVILLE R. R. CO. *v.* WINN.

[66 South. 201.]

CARRIERS. *Carriage of passengers. Who are "passengers." Code* 1906, *section* 4054.

Where plaintiff chartered a car of a railroad for the transportation of his household goods and a horse and cow the contract providing "one man allowed free as caretaker" and plaintiff took his place in the freight car with his property, in such case he was a passenger upon a freight train and the railroad company was not liable, except for gross negligence and carelessness of its servants as provided in Code 1906, section 4045.

APPEAL from the circuit court of Harrison county.

HON. JAMES H. NEVILLE, Special Judge.

Suit by J. F. Winn against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals.

Appellee chartered a car of the appellant at Biloxi, Mississippi, for transportation of his household goods

and a horse and cow from Biloxi to New Orleans, Louisiana. Under his contract with the railroad company, which provided, "One man allowed free as caretaker," appellee took his place in the freight car with his property. The car was then picked up by the local freight, which was to carry it to New Orleans, and the freight train did considerable switching before leaving the depot at Biloxi. Appellee claims that while engaged in switching, the train backed violently and knocked his horse and cow down. They were separated only by a rope, which appellee had stretched between them. Appellee said that he then went to the rescue of the horse to try and get him up, and while assisting him to his feet the train made another hard lunge and threw the horse toward appellee, and the horse stepped on appellee's foot and injured it. Appellee brought suit for the injury and recovered judgment for $1,000.

Section 4054 of the Code of 1906 provides as follows:

"Every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of its agents, engineers, or clerks, or for the mismanagement of its engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight, the company shall not be liable, except for the gross negligence or carelessness of its servants."

Appellee contends that the railroad company is not excused from liability under the last clause of the above section, because he contends that under his contract with the railroad company he is not to be termed a passenger upon a freight train intended for both passengers and freight. The railroad company contends that appellee was a passenger upon a freight train, and that the company is not liable, except for gross negligence and carelessness of its servants.

The contract between appellee and the railroad company provides, among other things:

"2. The shipper has examined and found in good order and condition the car or cars provided by said carrier for the transportation of said animals, and hereby accepts the same and agrees that they are, as thus provided, suitable and sufficient for said purpose, and said shipper will at his own expense provide such bedding *or other suitable appliances* in said car or cars as will enable said animals to stand securely on their feet while in the same. . . ." Page 88 of the transcript of record.

And also:

"5. Said shipper will separate the different kinds of stock in said car or cars *by strong partitions,* which he will provide at his own expense and risk."

Gregory L. Smith, Joel W. Goldsby and *Horace Bloomfield,* for appellant.

The evidence in this case shows that the train was a local freight and not intended for passengers. That its business was the handling of freight from Mobile, Alabama to Bay St. Louis, Mississippi. It is held by many high authorities that at common law a railroad company may carry passengers on its freight trains, and when it does, it assumes, to a somewhat limited extent, the liability of a carrier of passengers, but that all persons take the risk incident to the mode of travel they adopt, not however, risks from negligence, and one who travels on a freight train assumes the risks incident to that mode of travel as, for example, risk of injuries from jerks or jolts incident to the moving of freight trains. 4 Elliott on Railroads (2d Ed.), 389; *Wait* v. *Omaha, K. C. & R. Co.,* 65 S. W. (Mo.) 1028; *Moore* v. *Saginaw T. & H. R. T. Co.,* 72 N. W. (Mich.) 1112.

At the time of the alleged accident the liability to passengers on freight trains was plainly set out by section 4054 of the Code of Mississippi of 1906, which is as follows: "Every railroad company shall be liable for all

damages which may be sustained by any person in consequence of the neglect or mismanagement of any of its agents, engineers, or clerks, or for the mismanagement of its engines, but for injury to any passenger upon any freight train not being intended for both passengers and freight, the company shall not be liable, except for the gross negligence or carelessness of its servants."

In the case of *A. L. Perkins* v. *Chicago, St. Louis & New Orleans Railroad Company,* 60 Miss. 726, in construing section 1045 of the Code of Mississippi of 1880, and quoting said section in the syllabus as follows: "For injury to any passenger upon any freight train not being intended for both passengers and freight, such company shall not be liable, except for gross negligence or carelessness of its servants." It was further said in the syllabus: "Where, in an action by a passenger for damages against a railroad company for injuries received as such passenger, it is shown that the train, on which the plaintiff was a passenger, was a freight train not intended for both passengers and freight, the plaintiff must show gross negligence on the part of the servants of the defendant before a recovery can be had in view of section 1045 of the Code of 1880." CAMPBELL, C. J., in delivering the opinion of the court said as follows: "The train on which the appellant was a passenger was a freight train, not being intended for both passengers and freight," within the meaning of section 1045 of the Code of 1880 and the action of the circuit court upon the instructions was correct. The latter part of that section is a substitute for section 2 of the Act of March 15, 1876 (Acts 1876, 265), which employed the terms "mixed" or "accommodation" trains, "run for the accommodation of both passengers and freight." A train which is strictly a freight train, with only the appliances of such train, on which persons are not sought to be induced to take passage by the offer of other accommodations than are afforded by freight trains, cannot be said to be in-

tended for both passengers and freight, although all persons may become passengers by going into the conductor's caboose. They who take such passage on such a train cannot expect, and have no right to demand, the conveniences and attention required with respect to passenger trains or those intended by the carrier for both freight and passengers." *Illinois Central R. R. Co.* v. *White,* 82 Miss. 120, 52 So. 449; 33 Cyc. 763, 764; 33 Cyc. 815.

The peremptory instruction asked by appellant (instruction No. 8 for appellant), which reads as follows: "The court charges the jury that they ought to find a verdict for the defendant in this case." Under the authorities cited *supra,* should have been given and the court also erred in refusing to give the 9th instruction asked by the appellant, which reads as follows: "The court charges the jury that a railroad is not liable to a person who is riding upon a freight train for injuries which are caused by the mere negligence or carelessness of the train crew." The court also erred in refusing to give the 10th, 11th, and 12th instructions asked by appellant. For the reason set out in the assignment of error, and from the facts in this case we respectfully submit that the case should be reversed and remanded.

Mize & Mize, for appellee.

The appellant contends that it was entitled to a peremptory instruction under section 4054 of the annotated Code of 1906, which is as follows: "Every railroad company shall be liable of all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of its agents, engineers, or clerks, or for the mismanagement of its engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight, and the company shall not be liable, except for gross negligence or carelessness of its servants."

As this assignment of error lies at the very threshold of the case we will discuss it first. This case involves a construction of this section, and, in construing same, we contend that Winn, appellee, was not a passenger within the meaning of said section. In order to get at the proper construction of the statute, we will first have to find what the term "passenger," as used in said section, means. A passenger in the legal sense of the term is one who travels on some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare or that which is accepted as the equivalent therefor. 5 Am. & Eng. Ency. Law, page 486.

We contend that this section is applicable only to passengers who pay passenger fare, or buy tickets and ride on freight trains; in other words, are passengers as the term is generally understood. This statute seems to be in derogation of common law. At common law, a carrier owes a passenger the same degree of care for his safety, regardless of the character of the car or train on which he is being carried, there being no distinction between freight and passenger trains provided the freight train carried passengers, and, since the statute is in derogation of the common law, it should be strictly construed. In construing a statute, the court should endeavor to interpret the will of the legislature at the time of the passage of the act; and, as Blackstone says at page 25, Chase's Edition, "the rule which is the fairest and most rational to interpret the will of the legislator is by exploring his intentions at the time the law was made. These are shown by the words in the context, the subject-matter, the effects and consequence, or the spirit and reason of the law." "Words are generally to be understood in their usual and most known signification." Hence the word, "passenger" in this statute should be interpreted in the light of the meaning of the legislature, according to the above quoted rule.

This statute exempts the carrier from liability for injury in the case of passengers on freight trains except in cases of gross negligence. What kind of a passenger? Surely a passenger for hire, as the term is commonly employed, and does not apply to a charterer of a car loaded with household goods, stock, etc. in which he is travelling with the stock and goods to its destination and while in said car, known as an emigrant car, is hurt by the carrier, but, as laid down by Blackstone, the most effectual way of discovering the true meaning of a law, and the intent of the legislators, is by considering the reason and spirit of it, or the cause which moved the legislature to enact it; for, when this reason ceases, the law itself ought likewise to cease.

The next assignment of error is that the court erred in refusing to give instruction No. 12 asked by appellant which falls within the assignment as to the statute above discussed, to wit: "The court charges the jury that when a man rides upon a freight train and the train crew negligently or carelessly handles the car upon which he is riding and by such carelessness or negligence, causes him to be injured, he has no right to recover damages from the company for such injury; before such a person can recover he must show that the train crew was guilty of gross or reckless negligence."

This brings us back to what we have been discussing about gross negligence. We say first, that this charge is not correct as asked, because it makes not only gross negligence a precedent of recovery, but also reckless negligence. This instruction tells the jury that even though they might believe that the train crew negligently or recklessly hurt appellee, he has no cause of action unless the negligence was gross or reckless. We cannot believe this to be the law until the supreme court says so. We have searched the law diligently for a case in point, and find no case of this kind under a statute like we have, and hence we are unable to give the court the

benefit of any case in point, and will have to rely on the reasons we have given.

We further contend, in view of that part of the section above quoted which says: "But for injury to any passenger upon any freight train not being intended for both passengers and freight, the company shall not be liable except for the gross negligence or carelessness of its servants." So far as appellee, Winn, is concerned, the train of which his car made a part was intended for both passengers and freight. When the appellant chartered him this car, it gave him permission, in fact, required him to ride in this car, and when said car was coupled up to the train, it then became a part of a train intended for both passengers and freight, within the meaning of the section. Within the meaning of this statute, the whole train did not have to be intended for both freight and passengers to enable the injured party to recover for mere negligence; but, if any part of it was intended for passengers and freight, then it was a train intended for both passengers and freight within the meaning of said statute.

The damages in this case are not excessive; in fact, are very small. The evidence shows that appellee's foot was crushed, causing traumatic neuritis and a deposit of scar tissue, making his injury a very severe one.

SMITH, J., delivered the opinion of the court.

This cause was tried in the court below on the theory that appellee was not a passenger within the meaning of section 4054 of the Code, and therefore that appellant's liability was not limited to injuries inflicted upon appellee by reason of "the gross negligence or carelessness of its servants." The contention of counsel for appellee is "that this section is applicable only to passengers who pay passenger fare or buy tickets," and not to persons traveling by virtue of contracts like the one here under consideration.

There can be no merit in this contention, for the reason that, since appellee's transportation was a part of the consideration of the contract by which the car in which he was traveling was chartered, he was a passenger under all of the authorities (Words and Phrases, 5218, 5219; *Railway Co.* v. *Ashley,* 67 Fed. 209, 14 C. C. A. 368; *Railway Co.* v. *Blumenthal,* 160 Ill. 40, 43 N. E. 809), and the statute makes no distinction between the different kinds of passengers, but applies to all alike. While the point here under consideration may not have been necessarily involved in the case of *Railroad Co.* v. *Burnsed,* 70 Miss. 437, 12 So. 958, 35 Am. St. Rep. 656, it is clear from the opinion therein that the court proceeded upon the theory that a person traveling pursuant to a contract like that here under consideration is a passenger within the meaning of the statute.

Reversed and remanded.

LEWIS v. LYON COMPANY.

[66 South. 206.]

TAXATION. *Sale of lands. Statutes. Retrospective effect. Construction.*

Acts 1910, chapter 214, which changed the date for tax collectors to file conveyances of land sold for delinquent taxes from the first Monday of April to the first Monday of May, cannot be construed as having a retrospective effect, since there is nothing in the act which disclosed such an intention on the part of the legislature.

APPEAL from the chancery court of George county.

HON. J. M. STEVENS, Chancellor.

Bill by F. H. Lewis against Lyon Company. From a decree sustaining a demurrer to complainants bill, he appeals.

This is an appeal from a decree of the chancery court sustaining a demurrer of the appellee to the bill of complaint filed by appellant. This bill sought a confirmation of a tax title to certain land in George county, based upon a tax sale made by the tax collector on the first Monday (the 5th day) of April, 1910. The tax collector's deed was made and executed and bears date of April 5, 1910, and was filed in the office of the chancery clerk on April 14, 1910. Appellee demurred, on the ground that it appeared from the face of the bill that the tax collector's deed was not filed with the clerk of the chancery court on or before the first Monday of April, 1910, as required by section 4338 of the Code of 1906.

The legislature of 1910, on the 16th day of April, 1910, passed an act "to amend section 4338 of the Mississippi Code of 1906, so as to change the time for tax collectors to file conveyances of land sold to individuals from the first Monday in April to the first Monday in May." A prior session of the legislature had changed the date for sales for delinquent taxes from the first Monday in March to the first Monday in April, but had failed to make a change in the provisions of section 4338 as to the time of filing tax deeds, and this change was not made until April 16, 1910; and it is the contention of appellee that section 4338 of the Code of 1906 was in force on the 5th day of April, 1910, the day of the sale, and that appellant's tax deed bearing that date should have been filed on that date and, having not been so filed, was void, and that the change made in the statute April 16, 1910, extending the time for filing tax deeds to the first Monday in May, was not retrospective in its effect, and did not affect tax sales made on the first Monday of April, 1910. The lower court took this view of the question, and entered a decree accordingly, from which an appeal is taken.

H. B. Everitt, for appellant.

Conceding that the whole matter is within the discretion of the legislature and after the sale is properly made

at the proper time, and the sale only divests the title of the owner conditionally because of the two years allowed to redeem, is not the proceeding, so far as the owner is concerned, *in fieri?* The legal title has vested in the purchaser in the nature of an absolute deed given as security subject to a defeasance fixed by law. It is subject to redemption by paying the tax, damage and cost and as such the purchaser takes it. The due process of law for coercing the citizen to bear his part of the public burden begins with the lien declared and only ends with the expiration of the redemption period, until which time and during all of which period the process is in the control of the state's legally constituted official authorities. Within constitutional limitations the legislature may at any time alter the procedure so long as no vested right is destroyed or abridged. As to the taxpayer the whole scheme is a *quasi*-judicial procedure to the end of the redemption period. In *Vaughn* v. *Swayzie,* 56 Miss. 704, it is said that inasmuch as it is entirely competent for the legislature to prescribe such formulas as it pleases with regard to the levy and collection of taxes, it is fully within its power by retroactive legislation to dispense with their necessity and obviate the evils of their non-observance. The curative act in that case cured a defect in procedure that was vital and but for which the sale for taxes would have been void. The court would notice that in that case stress may appear to be laid on the fact that the curative act went into effect before the deed was made to the tax purchaser, but under the procedure at the time, no time for redemption was allowed and the sale was the final act and in that respect differs from the present scheme. Now the sale is not conclusive and final, the deed is retained in official custody and subject to official acts of filing, retaining or cancelling in case of redemption or delivering to the purchaser if not redeemed.

Official control of the title and rights of the parties is still retained for further procedure over which neither

the owner nor the purchaser have any control or right to complain of what the legislature may do in the matter of mere formulas of procedure. In the case of *Howie* v. *Alford,* the court confessed to a very awkward situation in arriving at the conclusion reached, one being the question of what would have been the effect of a failure of the tax collector to complete his sale and file his deeds on the first Monday of April and an adjournment or continuance of the sale to another day became necessary, but found consolation that all this confusion had been obviated by the amendments of the Code by the Acts of 1908 and 1910. During the month of April, 1910, the legislature, being in session, passed an act amending the Code and this declared that it was sufficient that the tax collector file his conveyance on or before the first Monday of May. That was approved and became the law before the first Monday of May, 1910, before which time the collector had failed to make his sales on the first Monday of April and the legislature should at once have amended section 4328 so as to add that if for any reason such sale should not be made on the first Monday of April it should be made on the first Monday of May. It will harly be contended that the sale could not be made on the first Monday of May of the current year. While this amendment of the Code by the legislature did not, by express language, extend the time for filing conveyances already made, it was evidently passed to obviate the confusion admittedly existing and so as to become the law before the first Monday in May, 1910. It thus extended the time for filing to a date then in the future as to sales made in April, 1910. In view of the manifest evil intended to be cured, the legislature must be understood as intending that the curative effect be so applied. Especially must this be true when no vested right was impaired or destroyed and a great public evil effecting the public revenue was involved. It is a matter of history of this legislature that in 1907 some tax collectors made their sales on the first

Monday of March and some first Monday of April, disregarding the change of the one section of the Code in the one case and following it in the other. That before the sales of 1908 the legislature changed another section from March to April. Then came the confusion discussed in *Howie* v. *Alford,* because of other changes of dates not having been made to follow the scheme that had been in vogue and worked well for years. So the legislature took another bite at the cherry, amended another section in April, 1910, directing that the tax collectors should have until the first Monday in May to file their deeds. But the statute still required, by section 2933 that lists of lands struck off to the state must be transmitted to the land commissioner on or before the first Monday of April. The legislature of 1912 corrected that by changing April to May. All of this legislation makes it perfectly manifest not only that the legislative intention was on the outset and continued to be a change of the day of sale to fix it one month later and to adjust other dates to correspond with this one change. In other words, it was never intended to shorten the time allowed for filing tax deeds or for transmitting the list of state sales to the land commissioner. Hence the purpose of these amendments was to extend the time. The amended statute merely effected the remedy pending proceedings looking to the final taking of the land for the taxes if not redeemed.

In *Chaffe* v. *Aaron,* 62 Miss. 29, after a sale of foreclosure had been made and reported for confirmation, the court, acting by authority of the statute, enacted subsequent to the date of the mortgage foreclosed, authorizing a resale on the owner giving bond to make the property bring more than fifty per cent advance of the bid and to pay cost, ordered a resale. It was contended that this impaired the contract rights of the mortgage. But it was held that it did not, but since it only effected the remedy it applied to a pending proceeding. It is said in *Brannon*

v. *Pringle,* 47 So. 674, that the law does not require that the deed be filed or marked filed by the clerk but merely that it be lodged in proper custody. And for whose benefit? Not for the benefit of the taxpayer to enable him to redeem, but that it may suspend the taking of possession and dealing with the title by the purchaser and retain control of the procedure up to the end of the expiration of the right of the owner to redeem.

But while the sales of 1910 may be thus saved in accordance with plain legislative intent, not inconsistent with the late decision of *Howie* v. *Alford,* it does seem to me that this pronouncement, by a divided court was inspired by some erroneous conclusions, hastily formed by other judges of this court, some of which were merely *obita dicta* and without mature reflection and careful research, and ought not to stand.

Ford, White & Ford, for appellee.

The sole point at issue in this case may be stated in just a few words, and it is this: Land was sold for taxes on the first Monday, the fifth day of April, 1910; section 4338 of the Annotated Code of 1906, which was then operative, required the tax collector's deed, under which appellant claims title, to be filed on or before the first Monday of April of the year of the sale; this tax collector's deed was not filed until the 14th day of April, 1910; the law relating to the time of the filing of tax collectors' deeds was notified on April 16, 1910, and tax collectors' deeds thereafter were required to be filed on or before the first Monday of May.

Under the decision of the court in the case of *Howie* v. *Alford,* reported in 56 So. 797, it would have to be conceded that this tax title under which appellant claims title to this land, would have been void, if section 4338 of the Annotated Code of 1906 was operative. The appellee makes the contention that chapter 214, of the Acts of the legislature for 1910, was prospective entirely in its opera-

tion, and had no effect whatever upon this tax title, or any other tax title, made on the first Monday of April, 1910. The case of *Howie* v. *Alford,* held in effect that a tax sale made on the first Monday of April, 1908, was void, if the tax collector's deed evidencing the sale was not filed on the first Monday of April, 1908.

The appellee makes the contention that chapter 214 of the Acts of the legislature for 1910, operated prospectively entirely, and we do not understand from reading the appellant's brief that this position is seriously controverted—the appellant has apparently taken the position that our court was wrong in the conclusion reached in the cases of *Adams* v. *Mills,* 71 Miss. 150; *Sintes* v. *Barber,* 78 Miss. 585 and *Howie* v. *Alford,* 56 So. 767, in holding that it was necessary for a tax collector's deed to remain on file with the chancery clerk for the full period of two years from the date of sale. The brief of appellant seems to be directed toward establishing the incorrectness of the court's holding in those cases. Now we do not propose to waste any time arguing the correctness of the court's conclusion. In those cases it was necessary for a tax collector's deed to be filed within the time required by law, and to remain on file from the time of filing for the period of two years from the date of the sale. The court's language in the cases of *Adams* v. *Mills, supra,* and *Sintes* v. *Barber,* supra, is too plain for argument, and the reasoning contained therein is absolutely sufficient, and we shall not attempt to either elaborate, or amplify, what our court really held in those cases. We merely quote the following paragraph from the opinion of the court in the case of *Adams* v. *Mills, supra*: "The requirement that the conveyance should be deposited and remain in the office of the clerk, was manifestly for the benefit of the owner of the land, who by the law was pointed to the place where he should apply for the purpose of redeeming. It appears from the evidence that application was made to the clerk by parties

supposing the land in controversy to be theirs, and thereupon the deed was marked canceled by the clerk, and forwarded by him to such persons, who promise to remit the redemption money, but who, after the lapse of several weeks, discovered that they had no interest in the land and refused to pay the money, but returned the deed to the clerk, who struck therefrom the entry of cancellation, and return it to the files, and, after the expiration of the period of redemption, delivered it to the purchaser. The right of the plaintiff to recover rests upon the validity of the deed."

SMITH, C. J., delivered the opinion of the court.

Since chapter 214 of the Acts of 1910 contains no language which discloses either an express or implied intention on the part of the legislature that it should have a retrospective effect, and since we must decline to overrule the case of *Howie* v. *Alford,* 100 Miss. 485, 56 So. 798, the decree of the court below must be, and is, affirmed.

Affirmed.

STATE *v.* POWE.

[66 South. 207.]

KIDNAPPING. *Nature of offense. Code* 1906, *section* 1079.

Under Code 1906, section 1079, a father who by agreement surrendered the custody of his minor child to his wife, is not guilty of kidnapping, because he enticed the child away from the custody of the mother, since the agreement with the mother does not relieve him of the duty to support the child.

APPEAL from the circuit court of Wayne county.

HON. J. L. BUCKLEY, Judge.

E. O. Powe, was indicted for kidnapping. From a judgment sustaining a demurrer to the indictment, the state appeals.

The facts are fully stated in the opinion of the court.

Luther K. Saul and *Frank Johnston,* for the state.

The third assignment in the demurrer is not well taken, as section 1079 of the Code of 1906, the section upon which this prosecution is based, is as follows: "Every person who shall maliciously, wilfully, or fraudulently lead, take, carry away, decoy or entice away, any child under the age of fourteen years, with intent to detain or conceal from its parents, guardian, or other person having lawful charge of such child, or for the purpose of prostitution, concubinage, etc."

The indictment follows the language of the statute and sufficiently charges the crime alleged to have been committed, and because it does not charge that the carrying away of the child was for the purpose of prostitution or concubinage does not vitiate it. The indictment states that the defendant, O. E. Powe, "did agree that the said Sudie W. Powe should have full and complete control, custody and possession of said children," one of which was the child alleged to have been abducted and it also states that the defendant did "with intent then and there to detain and conceal said child from its mother etc."

Under the statute, a person can be convicted of either of the offenses and it is just as much crime to conceal or detain a child from its parents or other person having the legal right to the custody of it as to decoy it away for the purpose of prostitution or concubinage. The defendant, being the father of the child alleged to have been abducted, having relinquished his legal right to the custody of it to its mother, as is charged in the indictment, can certainly commit the crime just the same as a third person could. The statute is especially designed to fit such cases as this one, the punishment upon conviction

being for the awful suffering and anxiety and the suspense of not knowing what has become of it, or whether the child is alive or dead, or whether it will ever again be seen or heard of by its parent or guardian; and to say that a parent who having relinquished his legal right to the custody of the child, could not, nor would be able to cause just as much anxiety to its mother, as taking it to a distant state and concealing it and never letting its mother know where it was for sixteen months, as was done in this case, would be preposterous.

Further: Section 1079 of the Code of 1906, does not state the sex of the child that can be abducted, but reads "any child" under the age of fourteen years. The crime can be committed by concealing or detaining a boy under the age of fourteen years from the party entitled to the legal custody of him. Hence it is not necessary that the child abducted should be a female and susceptible of being used as a concubine or as a prostitute.

The question no doubt will be raised by the appellee as to whether a father can be convicted for the abduction of his own child and to that end I wish to call the court's special attention to the following: "A parent who has not parted with his legal right to the custody of his minor child, or to whom the custody has been awarded in a divorce proceeding cannot be guilty of kidnaping." 24 Cyc. 801. Now, is it not reasonable, by the converse theory, that one who has parted with the legal right to the custody of his minor child could be convicted under our statute?

I further wish to call the court's attention to the following decisions, which by the converse theory, shows that one can be convicted for the abduction of his own child if he has parted with the legal right to its custody. *Hunt* v. *Hunt,* 94 Ga. 257, 21 S. E. 515; *State* v. *Angle,* 42 Kan. 216, 21 Pac. 1075; *Biggs* v. *State,* 13 Wyo. 94, 77 Pac. 901.

Frank Johnston, for the state.

Upon the question in respect to the criminality of the act, I will submit to the court that it is perfectly clear on authority that where there is a regular judicial decree in a divorce proceedings, or separation proceedings for the custody of the children, that a party to the suit who kidnaps one of these children in violation of the decree of the court may be held criminally responsible for his acts. In *State* v. *Farrar,* 41 N. H. 53. There was an indictment against the father for kidnapping his four-year-old child, where the custody of the child had been awarded to the mother in a court proceeding. The court said as a basis of its decision and the ground upon which the defendant in that case was held criminally liable was, that his right as the father of the child was divested by that decree just precisely in the same manner as the right to his wife was annulled by that decree.

The same doctrine was held in the case of *State* v. *Rollins,* 8 N. H. 565. The question, therefore, in the present case now before this honorable court is whether this contract for separation and the custody of the children will be given the same force and effect in law as a stipulation in a decree of the chancery court for a separation or divorce proceeding.

In the research that I have made, I have found no case directdly in point on this precise question. I will make this observation, however, to the court that if this separation agreement is to be held as valid and binding and *prima facie* settling the question of the custody of the children, whether or not such a case would fall within the rule of law in regard to the violation of the stipulations in the decree of the chancery court in a divorce proceeding is the question to be decided by this honorable court. I respectfully submit the question to this honorable court for decision.

REED, J., delivered the opinion of the court.

E. O. Powe was charged with kidnapping his child, a girl four years old. It is alleged in the indictment that he led, took, carried, and enticed away the child from her mother, who was then legally entitled to her custody and possession. Omitting the formal parts, the indictment reads:

"That E. O. Powe, on the 12th day of December, A. D. 1911, in the county aforesaid, did enter into a certain contract with one Sudie W. Powe, who was then and there his wife, whereby, for and in consideration of the dismissal by the said Sudie W. Powe of a certain suit in the chancery court of Wayne county, Mississippi, wherein the said Sudie W. Powe was complainant and the said E. O. Powe was defendant, which was then and there pending, and in which the said Sudie W. Powe was seeking the recovery of alimony and support against her said husband, the said E. O. Powe, and also the recovery of and a decree giving her the care and custody of the two children of her and the said E. O. Powe, to wit, Wilda, aged four years, and Mildred, two years of age, he, the said E. O. Powe, did covenant and agree to convey to the said Sudie W. Powe certain lands in full discharge of all claims for support as prayed for by her, and did agree that the said Sudie W. Powe should have full and complete control, custody, and possession of the two said children. The said Sudie W. Powe did then and there dismiss her said suit as she agreed, and did have the custody and possession of the two said children until the 27th day of April, 1912. And the jury aforesaid, upon their oath aforesaid, do further present that on the 27th day of April, 1912, having surrendered all right to the custody and possession of the said children aforesaid, did unlawfully and feloniously lead, take, carry away, and entice away, wilfully and maliciously, the said child Wilda, under fourteen years of age, to wit, of the age of four years, with the unlawful, willful, malicious, and

felonious intent then and there to detain and conceal said child from its said mother, to wit, Sudie W. Powe, who was then and there legally entitled to the custody and possession of the said child, Wilda, as aforesaid, contrary to section 1079 of the Code of Mississippi, 1906."

A demurrer to this indictment was sustained. Several grounds were assigned in the demurrer; but it is only necessary for us in this opinion to notice the ground that the indictment charges no offense under the law. It will be seen that the custody of the child was given to the mother through an agreement between the parents. There was no award of the custody by decree of court.

The question for decision here is whether the father can be held criminally liable on the charge of kidnapping his own child, where its custody was in the mother solely by virtue of an agreement with the father. It was decided in the case of *State* v. *Farrar,* 41 N. H. 53, that a father could be held on the charge of kidnapping his own child where he took it from the lawful custody of its mother; but in that case the custody of the child was assigned to the mother by decree of court, and it was said that the father, by force of the decree, had lost his right over the child. In the case of *In re Peck,* 66 Kan. 693, 72 Pac. 265, it was held that both parents were guilty of kidnapping their children, where they were taken from their grandmother, to whom their custody had been awarded by the court in a *habeas corpus* proceeding. The grandmother was held the person having lawful charge of the children, even against the parents.

In both of the cases above referred to the children were in the custody of persons by decree of court. We find no decision in this state dealing with the question presented in those cases, and we have been unable to find any case reported from any court discussing the precise question now before us. In a *habeas corpus* proceeding to determine the question as to the custody of the children between the parents, undoubtedly the agreement set forth

in the indictment would be given its due weight, and might be considered by the court as sufficient to justify the award of custody in accordance with its terms. Such proceeding would be a civil controversy between the contending parents. We are now dealing with the criminal liability of the father for kidnapping his child. Facts may be deemed sufficient to support a finding in a civil suit for the custody of a child, and yet be wholly insufficient to warrant the conviction of a father on the criminal charge of kidnapping.

This is a prosecution by the state for a violation of a statute. The duty to support and care for his child is imposed upon the father by law. He is answerable to the state for the abandonment and failure to support his child. He cannot, by agreement with the mother of the child, relieve himself of his responsibility to the state in the performance of his duty. While this responsibility continues, certainly there goes along with it some right over the child. It should not be said that, by reason of the agreement in this case, there has been such complete annulment and dissolution of the sacred relation of parent and child as to render the father guilty of kidnapping when he takes into possession his own child. The welfare and integrity of family organization, of which the father should be the head, forbids such holding. We must also bear in mind, while considering this question, that agreements for separation between married couples are not looked upon with favor.

Admitting that we will in this state follow the decisions of the courts of New Hampshire and Kansas herein referred to, surely we cannot give the same force to the agreement between the parents as to a solmen decree of a court of competent jurisdiction taking the custody of the child from one parent and awarding it to another. Under the facts stated in the indictment, appellee should not be held for the crime of kidnapping. The demurrer was properly sustained.

Affirmed.

SOUTHERN PACIFIC RAILROAD CO. v. A. J. LYON & CO.

[66 South. 209.]

1. CARRIERS. *Carriage of goods. Damages. Liability. Connecting carriers. Liability of initial carrier. Statute. Construction.*

Where goods were sold at a stipulated price, if they arrived on schedule time, but the carrier was not informed of this arrangement, and not arriving in time, the buyer refused to accept them and the owner was forced to resell them at the best price obtainable, the measure of damages was the difference between the market price of the goods at the time when they should have arrived and when they did arrive.

2 CARRIERS. *Connecting carriers. Liability of initial carrier. Statute. Construction.*

The Carmack Amendment to the Hepburn Act, approved June 29, A. D. 1906 (34 Stat. 593, U. S. Comp. St. Supp. 1911, page 1307) chapter 3591, section 7, pages 11, 12, declaring that every railroad company receiving property for transportation from one state to another shall issue a receipt therefor, and shall be liable for any loss caused to it by any carrier to which the property may be delivered or over whose line it may pass, makes the initial carrier liable for delay by a connecting carrier, although the bill of lading provides otherwise.

APPEAL from the chancery court of Lauderdale county. HON. SAM WHITMAN, JR., Chancellor.

Bill by A. J. Lyon & Company, against the Southern Pacific Railroad Company. From a decree for complainants, defendant appeals.

The facts are fully stated in the opinion of the court.

Bourdeoux & Venable, for appellant.

This is the first error of the trial court. A misconception of the former opinion of this court on the former appeal. Having thus decided the liability of appellant, the court below proceeds to assess the damages. In this aspect of the case, we submit that there were two errors

committed by the learned chancellor: First, the damages allowed were for loss on special contracts with purchasers, when no notice of these contracts was given appellant; second, this damage is not shown to be the difference in market value between the time that the shipment should have arrived and that time that it actually did so.

We challenge the record to show where there is one particle of proof of the market value at the time of the arrival of the shipment or at the time that it should have arrived. The appellee had special future contracts for the sale of the goods. Prices may have advanced or declined. For anything that appears from the record, the market price of the fruit at the time it arrived was actually higher than at the time it should have arrived. If this be true, certainly we have legal authority to say that appellee was not damaged. But conceding this to be true, appellee says that he lost profits on special contracts, and on the clearest legal principles is not liable. Assuming we know that appellee intended the goods for resale, we could only be held for the difference in the market value. But no market or difference in value is shown, and we are sought to be held on special contracts, of which we had no notice, which may have been higher than the market value. Surely, we are not liable.

These propositions are too elementary to require citation of authority. If any be needed, we refer to the extracts of the law cited in the brief of counsel for appellee.

The brief of appellee proceeds on the following fallacies: First, that the contract of carriage was from Fresno to New Orleans; second, that the law of this case has been settled to be that the Hepburn Act applies to delay as well as loss, damages or injury; third, that even if no market values were shown by the proof, yet our alleged negligent delivery rendered us liable for loss of profits on special contracts of sale.

Appellee says: "Appellant cannot hide behind the law that says that the shipper must have notice of special damages. Appellant knew that appellee was a wholesale grocery dealer, and that the goods were bought for resale."

Assuming that there was negligence with which appellant was chargeable, no one, even if negligent, is chargeable with any damages which is not the proximate result of the negligence. It is universally held that profits on special contracts when lost by the negligence of a carrier are not proximate damages, unless the carrier had notice of them. Appellee asks the court to repudiate a fundamental principle of damages.

As to the contention that the law of the case has been settled to be that the Hepburn Act applies to delay as well as loss or damage, we beg to say that this is a misconstruction of the judgment of this court. The Hepburn Act applied because of the damage to the five boxes of raisins, and this was the extent of the judgment of this court. It is the rule, as we understand it, that in construing this opinion the court will adopt that construction which renders it correct, so if this court should be of the opinion that the Hepburn Act does not apply to delay in delivery, the supposedly ambiguous judgment should cause no difficulty, since it is correct and can be sustained as appyling and intending to apply to the matter of the damaged raisins alone, and this is what we believe was actually intended.

Before closing, we desire to call the court's attention to several unintentional misstatements in the brief of appellee. The record nowhere shows that appellant had any notice that the goods were for resale. The goods, when they came into the hands of appellant, were the property of the Monarch Fruit Company, consigned to this company at Meridian, with orders to notify A. J. Lyon & Company. Appellant did not know whether A. J. Lyon, was a broker, a merchant, or what, and it is also

true that appellant had no notice that Lyon had special contracts of sale for the raisens. In this respect, brief of counsel for appellee is misleading.

It will be noticed also that the raisens for which damages were allowed were all actually sold. The damages are the loss of profits on special contracts of sale. No claim is made that these raisins were damaged or injured or lost.

It is said, also, that appellant did not explain its negligent delay in delivery at New Orleans. This is not borne out by the record. It is undisputed that the delay was not caused by appellant, but by a connecting carrier for whose negligence appellant is not liable, under the terms of its contract of lading, and is not liable at all, unless it is held that the Hepburn Act applies to delay as well as loss and damage.

McBeath & Miller, for appellee.

Counsel for appellant in his ingenious brief endeavors to limit the question to be presented to this court to a construction of the Carmack amendment to the Hepburn Act of Congress, approved June 29, 1906, but the learned chancellor, in passing on this matter, twice held that the Southern Pacific was liable for failure to comply with its contracts to "safely transport said car from Fresno, California to Meridian, Mississippi, *via* the Queen & Crescent at New Orleans."

The appellant demurred to this bill and one ground of the demurrer was that, the bill set out one cause of action, because the contract sued upon, to wit, the bill of lading, shows that the Southern Pacific Company undertook only to transport said car from Fresno, California, to El Paso, Texas."

But neither the lower court nor this court adopted counsel for appellant's views. Judge WHITFIELD, in this case reported in 54 So. 728, in response to this ground of demurrer says: "The view asserted by the demurrer

is too narrow. The bill of lading must be taken as a whole and it provided that the Southern Pacific should deliver to the Queen & Crescent System, New Orleans, Louisiana."

We have a construction of the "bill of lading" in question from this court and it is held that the contract provided that the Southern Pacific undertook to safely transport this car from Fresno, California, to New Orleans, Louisiana, and deliver it to the Queen & Crescent System. The law implies a contract to deliver it within a reasonable time, and we submit that both the chancellor and this court were correct in their construction of the bill of lading. If the Southern Pacific Company did not transport said car safely and within a reasonable time from Fresno, California, and deliver it to the Queen & Crescent System at New Orleans as they agreed to do, then they are liable to A. J. Lyon & Company for such damages as they sustained by reason of the delay.

Courts don't make contracts, they construe them. Appellant, by its bill of lading, agreed to safely and within a reasonable time transport said car from Fresno, California, and deliver it to Queen & Crescent System at New Orleans, and when they deliver it to the Illinois Central System, they breached their contract.

Nowhere in the records nor in the brief and argument of counsel for appellant will be found any explanation or justification of the negligence of appellant in delivering this car to the Illinois Central Railway and letting it remain there nine or ten days. So we contend irrespective of the Hepburn Act, appellee is entitled to recover. As to the Hepburn Act we cannot agree with counsel for appellant that the delay did not occur on the line of appellant. It contracted to deliver the car to the Queen & Crescent System at New Orleans nine or ten days before it did so. The proof shows that the delay resulted in considerable loss and damage to appellee and if this court should be of the opinion that this delay was caused

by one of the connecting carriers and not the appellant, the initial carrier, yet we submit, that no court will give this act the narrow and restricted construction that counsel for appellant insists upon. It is such damages as had been proven in this instant case as is contemplated by the Hepburn Act.

In *Southern Pacific v. A. J. Lyon,* 51 So. 784, which is the instant case, Judge WHITFIELD says: "The bill of lading in this case was executed on November 11, 1906, and was therefore subject to the provisions of the Hepburn Act, since the suggestion of error is based wholly on the special contract manifested by the bill of lading and limiting the liability of the initial carrier to loss accruing on its own line, and since this stipulation was written out of it by the said Hepburn Act, the suggestion of error is of course, without merit. As to measure of damages.

We do not think there is any question as to the right of the appellee to recover in this cause, and we insist that the chancellor was correct in assessing these damages. The delay of ten days in New Orleans, which delay was unexplained, is such negligence that would make appellant liable for all damages that occurred. And appellant cannot hide behind the law that says "that the shipper must have notice of special damages." Appellant knew that appellee was a wholesale grocery dealer, and that the goods were bought for resale. Hutchinson on Carriers (3d Ed.), sec. 1366.

COOK, J., delivered the opinion of the court.

This case has been before this court upon an appeal from a decree overruling appellant's demurrer to the bill of complaint, and the decisions of the court are reported in 99 Miss. 186, 54 So. 728, 34 L. R. A. (N. S.) 234, Ann. Cas. 1913D, 800, and in 54 So. 784. This appeal is from a decree against appellant upon the merits.

It appears from the evidence that A. J. Lyon & Company were wholesale grocers and candy manufacturers,

and as such bought a car load of fruit in California and delivered same to the Southern Pacific Railroad Company, appellant, to be transported over its and connecting lines to Meridian, Mississippi. These goods were bought for resale to the customers of the wholesaler and were goods for the holiday trade. The fruit had been sold in advance of shipment.

The goods were delivered to the carrier on November 2, 1906, and should have been delivered at the point of destination not later than November 25th. They were not delivered until December 11th, too late for the holiday trade, and the parties to whom they were sold refused to accept same. The owner was, therefore, forced to resell the goods at the best price obtainable. The suit was for the difference between the price for which the goods had been sold before shipment and the price for which they were actually sold, together with the necessary expenses of reselling, and it was upon this basis the decree appealed from was rendered by the court.

It is the contention of appellant that the true measure of damages was the difference in market value between the time when the shipment should have arrived and the time it did actually arrive at Meridian. There is nothing in the record to show the market value of the goods at either of these dates; the shipper proceeded entirely upon the theory that he was entitled to recover the difference in the price for which he had contracted to sell the goods and the price for which they were actually sold.

The evidence does not show that the carrier was advised that the goods had been sold for the holiday trade when it issued its bill of lading. Where goods are sold to arrive within a certain time at a certain price, but the carrier is not informed of this fact, and knows nothing of the importance to the shipper of a prompt delivery, the carrier can be held liable only for the depreciation in the market value between the time when they should have been and the time when they are delivered.

Special damages can be recovered from the carrier for delayed transportation only where it is shown that the shipper informed the carrier, at the time the contract was made, of the special circumstances requiring prompt transportation and delivery. This is the rule in this state, and seems to be universal. *Express Co.* v. *Jennings,* 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708; Elliott on Railroads, sec. 1730 *et seq.;* Hutchinson on Carriers, sec. 1367.

Appellant also contends that it is not liable for the negligence of its connecting lines; that it made a special contract with the shipper which limits its liability. The bill of lading contains this clause:

"To be carried upon the conditions expressed herein, to the company's freight station at El Paso, and there delivered in like good order to the consignee or owner, or to order of said consignee or owner, or to such company or carrier (if the same are to be forwarded beyond said station), whose line may be considered a part of the route to the place of destination of said goods or packages, it being distinctly stipulated that responsibility of this company shall cease at the station where delivered to such person or carrier."

It is said that the proof conclusively shows that the delay did not occur on appellant's line, and therefore, under the contract, it is not liable. It is earnestly insisted that the act of Congress commonly called the Carmack amendment to the Hepburn Act, approved June 29, 1906, imposes no liability on the initial carrier for a delay not caused by it but caused by the connecting carrier, in a case where the initial carrier and the shipper have entered into a contract exempting the initial carrier from all liability after it has safely and promptly transported the goods and delivered same to the connecting carrier. We quote that part of the act of Congress applicable to this case, as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a

point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Appellant argues:

"That there is quite a difference in imposing liability on the initial carrier for loss, damage, or injury to the goods themselves, and for consequential damages caused by a delay in transportation."

We think this view of the act of Congress is too narrow. In our opinion there is a damage or injury to the goods themselves by a delay in transportation, when it is shown that the delay in transportation has caused the goods to depreciate in value in the market of their destination.

For the failure to prove any depreciation in the market value of the goods, the cause is reversed and remanded.

Reversed and remanded.

ED V. PRICE & COMPANY *v.* ROUSE BROTHERS & SMITH.

[66 South. 210.]

CORPORATIONS. *Insolvency. Preference to creditors. Giving security.*

Where a corporation owning land mortgaged to a bank, conveyed it to a director, who gave a new mortgage thereon, the proceeds of which were paid to the bank, which released its mortgage, in order that the new mortgage might be a first lien, it being agreed that a second mortgage should be made for the balance

of the original debt, and the second mortgage was not given, but to carry the debt temporarily, the corporation gave its note endorsed by the directors, and the land was later sold, the purchaser assuming the senior mortgage and giving purchase money notes for the balance, which notes were pledged as security for the corporation note held by the bank; such pledges were not fraudulent as an attempt, while insolvent, to prefer the bank as a creditor of the corporation or to relieve its directors of liability, but was merely a substantial performance of the agreement to give a second mortgage.

APPEAL from the circuit court of Pearl River county.

HON. R. E. SHEEHY, Chancellor.

Suit by Ed. V. Price & Company, and others against Rouse Brothers & Smith. From a decree for defendant, complainant appeals.

The facts are fully stated in the opinion of the court.

D. E. Sullivan, for appellant.

It will be seen from the foregoing agreed statement of facts and the pleadings in this cause, that the corporation of Rouse Brothers & Smith after it ceased to be a going concern, and while it was insolvent, undertook to prefer a debt of four thousand seven hundred and ninety dollars and forty-eight cents, owing by it to the National Bank of Poplarville, evidenced by notes endorsed by the individual members of its board of directors. Of course, each director was separately liable for the entire debt of this corporation, while he has been relieved of that liability to the extent of the amount of the notes transferred by the corporation, if such transfer holds in law. The principal amount of the McCoy notes so transferred is four thousand four hundred dollars which lacks but three hundred and ninety dollars and forty eight cents of equaling the debt of the corporation of Rouse Brothers & Smith to the National Bank of Poplarville. I submit that depositing these notes as collateral to secure the debt of the corporation of Rouse Brothers & Smith to the National Bank of Poplarville, which was endorsed by the

directors of the debtor corporation while it was insolvent, is contrary to the law. This proposition is clearly settled in this state in the case of *Love Mfg. Co.* v. *Queen City Mfg. Co.*, 74 Miss. 290. I quote from the opinion of the court in this case at page 300, as follows: "The precise and only question now involved is, may the directors of an insolvent corporation prefer themselves, by devoting its assets to pay debts due them, or debts on which they are bound as endorsers for the corporation? This question has not before been decided in this state, and we have no hesitation to announce that this cannot be lawfully done. To permit it would be to allow those intrusted with the governing power of a corporation to prefer themselves by their own determination and actions—a proposition monstrous in the extreme, shocking to the moral sense, and wholly indefensible, as it seems to us."

The facts of the foregoing case shows that the Queen City Mfg. Company an insolvent corporation, executed a general assignment by which it preferred debts due to several of the directors, who were stockholders, and it also preferred debts for which two of the directors who were stockholders were bound as endorsers.

I quote again from the opinion in this case at page 301, as follows: "If it be conceded that a corporation, in failing circumstances, may do what a natural person may, it would not follow that this preference could be upheld, for it was never heard that a natural person might prefer himself by an assignment, general or special, or otherwise. He may prefer others, but not himself. These directors, by their own will and act, preferred themselves, a thing quite natural, but which the law cannot sanction. By their act they practically dissolved the corporation and put an end to its going, and appropriated its property to themselves, thereby destroying forever all chance of realization of other creditors from the continued operation of the corporation."

I do not consider it necessary to comment further on this point. It appears in the agreed statement of facts

that the National Bank of Poplarville, at one time had a trust deed on the property which was afterwards sold to McCoy, and the notes for the purchase money of which were deposited with the bank as collateral to secure the debt of the corporation which was endorsed by the corporation directors. This trust deed the bank cancelled in order that the Georgia State Savings Association might make a loan on the property secured by a first trust deed. This loan was made, and the amount, four thousand, five hundred dollars, was paid on the debt owing by the corporation to the National Bank of Poplarville. When the bank cancelled its trust deed, it took the note of the corporation endorsed by the directors, with the understanding that a second trust deed would be executed by the corporation to the Bank of Poplarville, to secure the balance of the debt after the payment of four thousand, five hundred dollars borrowed from the Georgia State Savings Association. This trust deed was never executed. However, no doubt, counsel for the National Bank of Poplarville will contend that the bank has the right to hold these notes and apply the proceeds to the payment of the debt endorsed by the directors, because of the agreement to execute a second trust deed for the bank. I do not think the bank acquired any right by such an agreement. The agreement to execute the second trust deed was not in writing and the bank could not have compelled its performance. It was void, and in violation of the statute of frauds, and surely a party to a void contract, and one in direct violation of a positive statute cannot enforce any rights under such a contract.

I submit that the chancelor erred in finding in favor of the defendant, and that the decree should be reversed and the complainants should recover from McCoy the amount of the purchase money notes, principal and interest.

J. M. Shivers, for appellee.

The statement of the facts as to the statute as shown by the pleadings and the agreed statement of facts are,

that the corporation of Rouse Brothers & Smith, appellee here, had made no general assignment for the benefit of their creditors at the time of the transaction complained of here; and hence by statute all of the said corporation's property was vested in its stockholders subject to all liens legally incurred by said corporation and to all judgments and execution under such judgments. It is admitted that the debt due the Bank of Poplarville was for the purchase money for the lot and buildings described in the bill of complaint, which deeded in trust to the said bank, and which was thereafter deeded by the board of directors of the corporation to H. K. Rouse in order that he might be able to secure from the Georgia State Building and Loan Association a part of the money to reimburse the Bank of Poplarville to secure the balance of the debt, and in the interim to secure the bank by the note of the corporation of Rouse Bros. & Smith endorsed by H. K. Rouse, H. S. Smith, I. S. Kirkland and J. F. Padget, all of whom were stockholders and directors of the corporation of Rouse Bros. & Smith. The second deed in trust referred to in the agreed statement of facts was not executed because of the sale made to McCoy, as stated. McCoy executed his notes to the Georgia State Building Association for a part of the purchase money for the said lot and buildings, assumed the indebtedness of H. K. Rouse to it, and executed his notes for the balance of the said purchase money to H. K. Rouse, admittedly the trustee in this particular transaction for the corporation of Rouse Bros. & Smith, which notes were transferred to the appelee, Bank of Poplarville as collateral to the note of the directors of the said Rouse Bros. & Smith which was the lien debtor by the said Rouse as trustee for Rouse Bros. & Smith. The question is, does this novation of the debt, or of a part of the original debt secured by an express lien upon real estate by a new note of the lien debtor, or by the substitution of a note given by the vendee of the lien debtor, discharge the lien? The

appellee, the Bank of Poplarville held a lien on the property sold to McCoy for the purchase price advanced by it to Rouse Bros. & Smith. The security followed so long as the original debt or any part of it could be traced into the notes. *Kausler, et al.* v. *James C. Ford et al.*, 47 Miss. 289.

But the learned counsel for appellant holds that taking the note of the individuals who were directors in the appellee corporation of Rouse Bros. & Smith made them liable for the entire debt which he had endorsed, and that each one has been relieved of that liability to the extent of the amount of the notes transferred by the corporation if such transfer holds in law," and insists that the depositing the said McCoy notes given for the purchase money of the real estate as collateral to the note of the directors, so temporarily given as stated in the agreed statement of facts is contrary to law, and cites *Love Manufacturing Co.* v. *Queen City Manufacturing Co.*, 74 Miss. 290, 20 So. 146, as authority for the proposition.

The case at bar does not come within the condemnation of the supreme court as expressed in the opinion in the case of Love Mfg. Co. in our opinion. Here was no general assignment for the benefit of creditors, here were no debts due the corporation by the directors, here was no gobbling up the assets of the corporation, here was no fact to show that the officers of the appellant corporation "appropriated for their own benefit the available assets of the corporation of which they were the governing body." There was no fraud about this transaction, there are no preferential assignments of assets of the corporation to any of the endorsers of the note to the Bank of Poplarville, the bank held the property of the corporation under a deed in trust given years before by the corporation for the very money which paid for the lot on which was situated the storehouse and other buildings sold to McCoy. The said corporation had had the use and revenue of the said property until long after the note on

which was founded the deed in trust was due. The debt of the corporation of Rouse Bros. & Smith to the Bank of Poplarville for money advanced by the bank to Rouse, of Poplarville, agreed to cancel its deed in trust in favor of the Georgia Savings Association, and did so for the purpose of benefiting the corporation, by preventing the said property being sold at a forced sale and consequently for less than its market value. This deed in trust being cancelled solely that the corporation might secure the said sum of four thousand, five hundred dollars, with the express agreement that the corporation should execute and deliver to the Bank of Poplarville a second deed in trust to secure the payment of the balance due at the time when this deed should have been executed and delivered as per agreement, when the bank had performed its part of the agreement by cancelling its deed in trust, it appeared that a sale might be made in a very short time, and the matter settled satisfactorily, without a new deed in trust. So, then, the matter was arranged for the interim, by the note endorsed by individuals who were directors of the corporation, as they hoped to the interest of the corporation, their minds being untainted by the idea of fraud or of personal benefits. But, alas for human foresight; they forgot human greed, the prejudice against "soulless corporation," which still clogs the progress of this age—forgot perhaps that there were legions of legal lights which must be kept trimmed and burning, and soon like the storied fish found that they had leaped from the frying pan of financial trouble into the fire of litigation.

This agreement as to the execution of the deed in trust not being in writing is characterized by the learned counsel for appellants, as being void, and the bank could not compel its performance. The agreement was valid and binding. It was a trust valid and binding. The statute does not embrace trusts. *Runnells* v. *Jackson,* 1 Howard, 358; *Evans* v. *Green,* 23 Miss. 295; *Jones* v. *McDougal,* 32 Miss. 179; *Sells* v. *Grocery Co.,* 72 Miss. 590, 17 So. 236.

Tally & Mayson, for appellee.

We submit that the court below reached the only conclusion warranted by the law and the facts in this case. That the corporation originally owed the appellee, bank, eight thousand dollars for money loaned with which to buy the storehouse cannot be denied and is in fact admitted. The transfer of the property to Rouse was for the express purpose of enabling Rouse Bros. and Smith to get a loan on the property to reduce its indebtedness to the bank. The money loaned the corporation by the loan association only amounted to about one-half of the debt originally owing the appellee bank. The deed of trust held by the bank was to be cancelled and a second one executed in its favor, but it was never done. Opposite counsel says that this agreement was void because not reduced to writing; but whether void or not it is not material as we will later undertake to demonstrate. When McCoy purchased the property, the debt to the loan company was not extinguished; he assumed that. The balance due the bank on the original indebtedness had not been paid; he assumed that, giving his notes therefor which were endorsed by the officers of the corporation. And because these notes executed by McCoy for the indebtedness originally owing the bank were endorsed by the officers of Rouse Bros. & Smith, the contention is advanced that the transaction was fraudulent and void and the bank must forsooth lose its debt. We contend that such a proposition is wholly without merit and cannot be maintained.

In so far as the records show, the bank was the first creditor of Rouse Bros. & Smith. Certainly it is true that no one of the appellants ever furnished any part of the money to buy the storehouse and lot. It makes no difference how many changes there might have been in the mere form of the debt due the bank, the fact remains that the evidence thereof represents the money originally loaned Rouse Bros. & Smith. The debt is the matter and

thing to be considered and not the manner in which it is evidenced. Appellants are not deprived of a single right, legal or equitable, by the stockholder's endorsement of the McCoy notes. If they have any rights which they can invoke against the endorsers of the note, the most that they could ask would be to compel the bank to first seek satisfaction out of McCoy individually or resort to the security, to wit: The property conveyed him as evidenced by his notes. We stated that it was immaterial whether or not it was understood and agreed that the bank should have a second deed of trust when the one was executed in favor of the loan company. If the agreement was not consummated, as appears from the record, then the cancellation of the first one had the effect only, or subordinating it to that one executed in favor of the loan company. That equity will keep alive or extinguish an instrument as will best subserve the purpose of justice is a proposition unanimously assented to in all courts. *Howell* v. *Bush,* 54 Miss. 437; *Sansler* v. *Sallis,* 54 Id. 446; *Young* v. *Skiner,* 5 Am. St. Rep. 701; Pom. Eq. Jurs., sec. 791.

The proposition is elementary that equity looks to the intent rather than to the form of a transaction. While we have no complaint to make of the principal enunciated in *Love Mfg. Co.* v. *Queen City Co.,* 74 Miss. 290. We insist that the doctrine there promulgated is not applicable to the case under consideration. It will be observed that the Queen City Mfg. Company undertook to make a general assignment in favor of all its creditors that while the assignment purported, on its face, to be a general one, as provided by chapter 8, Code 1906, it was nevertheless a preferential one because a larger portion of the schedule indebtedness was either debts owing to the stockholders of the assignor corporation or debts which the corporation had contracted for their special benefit. The fact that the creditors were not to be paid out of the funds *pari passu,* but that the stockholders and not creditors

of the corporation were preferred, nullified its effect as a general assignment. Of course, where a corporation or an individual makes a general assignment, pursuant to the code chapter all creditors must be treated alike, but there is no pretense here that this corporation ever undertook to make a general assignment in favor of its creditors. It has been the law from a very early date in this state that a debtor in failing circumstances has a right to prefer certain creditors, and which rule has never been departed from so far as our researches extend, but this is not the case of a debtor in failing circumstances undertaking to prefer creditors, but it is the case of a creditor to whom the corporation owes a debt from the time of its inception and has held security for that debt seeking to secure a satisfaction out of the securities that were originally executed to grantee as a satisfaction on the debt. The appellee, bank, is not now nor never was a stockholder of the corporation of Rouse Bros. & Smith. It seeks not to divest appellant of any right, nor to overreach them in any respect; it merely asks that it be reimbursed for money loaned Rouse Bros. & Smith since it engaged in business. It has neither desire nor inclination to prevent appellant from collecting of Rouse Bros. & Smith, its shareholders or directors, any debt they may owe them, but it does insist that it would not only be inequitable but an absolute perversion of justice to declare its debt contraband.

Long before, as the records show, the debt of the appellants was contracted, the property had been conveyed to Rouse for the purpose of enabling the corporation to secure funds. A prospective creditor of the corporation then, in examining the public records, would naturally draw the conclusion that the storehouse was the individual property of Rouse. We merely call the court's attention to this to show these appellants did not and could not regard the storehouse as an asset of the corporation as a basis upon which to extend it credit. The only legitimate

complaint that appellants could urge against the endorsement of the notes by the officers of Rouse Bros. & Smith is that the appellee bank might undertake to enforce a personal liability against them and thereby diminish their ability to respond to them, the appellants. The bill makes no such averment, but on the contrary, its charge would seem to support the conclusion that the directors are personally liable to appellants. In short, appellee's contention is that the bank is entitled as of right to have McCoy pay it the balance due it on the purchase money for the sale of the building. It is true the form of indebtedness has changed to some extent, but the debt is the principal thing to be considered, and if the debt as originally constracted is still owing the bank, a proposition about which there is no contention, then the bank has the right to have McCoy pay to it the balance he is due on the building or at least pay to it the amount of the purchase money that is still due and owing.

COOK, J., delivered the opinion of the court.

The bill of complaint filed in this case, together with the amendments thereto and the orders of the court permitting creditors of Rouse Bros. & Smith, a mercantile corporation, to join in the litigation, was, in effect, a creditor's bill to have certain collateral notes assigned to the Bank of Poplarville, and described in the agreed statement of facts, declared general assets of the said insolvent incorporation. It was contended by complainant that the assignment of the notes to the Bank of Poplarville was to all intents and purposes a preference of the directors by themselves, condemned by this court in *Love Mfg. Co.* v. *Queen City Mfg. Co.*, 74 Miss. 290, 20 So. 146.

The cause was submitted to the court upon an agreed statement of facts, and we here copy same, viz.:

"Rouse Bros. & Smith bought block 10, fully described in the bill, for eight thousand dollars, in 1905, and paid

about five hundred dollars in cash of the purchase price, and executed a deed of trust on the property to the Citizens' Bank of Poplarville for the balance of the purchase money, being about seven thousand, five hundred dollars, and paid this amount over to the vendors. This deed of trust was executed the day Rouse Bros. & Smith bought the property. Afterwards, on the 29th day of January, 1907 Rouse Bros. & Smith borrowed seven thousand dollars from the Bank of Poplarville to take up the trust deed of the Citizens' Bank. On the —— day of September, 1907, the corporation of Rouse Bros. & Smith conveyed the property, block 10 as described in the bill, to H. K. Rouse, pursuant to a resolution of the board of directors reciting a consideration of one hundred dollars. On the 24th day of September, 1907, H. K. Rouse and his wife executed a deed of trust on that property to the Georgia State Building & Loan Association for a loan of four thousand, five hundred dollars. This sum was applied to the payment of the mortgage on this same property held by the Bank of Poplarville, on the 19th day of January, 1908, and the Bank of Poplarville then canceled its trust deed on this property, leaving the Georgia State Building & Loan Association holding a prior lien. On the date of the payment of the four thousand, five hundred dollars to the Bank of Poplarville, Rouse Bros. & Smith, corporation, executed its note to the Bank of Poplarville, indorsed by its board of directors, for the balance owing said bank after the application of the four thousand, five hundred dollars to its debts, which balance had been secured as aforesaid by a mortgage on this property. The Bank of Poplarville held this note, inodrsed by the board of directors of Rouse Bros. & Smith, until the —— day of August, 1909, when H. K. Rouse sold and conveyed the property (block 10 as fully described in the bill) to M. N. McCoy for eight thousand dollars, McCoy agreeing to assume the balance due the Georgia State Building & Loan Association secured by

trust deed, and paid to H. K. Rouse sixty-five dollars in cash, and executed his promissory notes for the balance of the purchase price, as follows, to wit: One note for one thousand dollars, due September 1, 1910; one note for one thousand, seven hundred dollars, due September 1, 1911; and one note for one thousand, seven hundred dollars, due September 1, 1912. That H. K. Rouse deposited the purchase-money notes of McCoy with the Bank of Poplarville to secure the balance owing that bank, for which it had taken the note of Rouse Bros. & Smith, indorsed by the board of directors, when it canceled its lien on the property, said note being renewed by Rouse Bros. & Smith and indorsed by the board of directors, and the purchase-money notes of McCoy held as collateral security. This note has not been paid; neither has the collateral, consisting of the purchase-money notes executed by McCoy.

"When Rouse Bros. & Smith, corporation, conveyed block 10 to H. K. Rouse, it was for the purpose of executing a mortgage or trust deed on the property and borrowing four thousand, five hundred dollars from the Georgia State Building & Loan Association, the proceeds of which were to be applied to the payment of the debt owing the Bank of Poplarville, which debt was secured by a mortgage on this property. When Rouse took the title from Rouse Bros. & Smith to the block of land and storehouses in question, he was the trustee of the corporation, and held the title for the benefit of the corporation, and sold it for the corporation when he sold it to M. N. McCoy and took the purchase-money notes from M. N. McCoy to pay the debts of the corporation and used the notes as aforesaid.

"That at the time the Bank of Poplarville canceled its mortgage on the property and accepted the note secured by indorsement of the said board of directors, it was orally agreed that a second mortgage should be executed to said bank on said property to secure said bal-

ance; that a second mortgage was drawn up by the attorneys of the Bank of Poplarville, but afterwards an opportunity was secured to dispose of the said property to M. N. McCoy, and said notes were deposited with the bank as collateral, instead of said second mortgage being executed. While complainant's counsel admit the truth of the statement with reference to the second mortgage to be taken by the Bank of Poplarville, they reserve the right to object to the same for irrelevancy and incompetency.

"All the exhibits referred to in the bill of complainant and the several answers thereto are considered as introduced and read in evidence at the trial of the cause. All the pleadings, exhibits, records and judgments in the suits by the several creditors against Rouse Bros. & Smith in the courts referred to or mentioned in the bill of complainant are considered, introduced, and read in evidence at the trial of the case and may be referred to.

"The names of directors who indorsed the note of Rouse Bros. & Smith to the Bank of Poplarville are as follows: H. K. Rouse, H. S. Smith, I. S. Kirkland, J. F. Padget. Some of these directors were solvent when they signed said note and renewal, and still are solvent. The corporation of Rouse Bros. & Smith had ceased to be a going concern when the notes of M. N. McCoy for the purchase-money of block 10 were placed with the Bank of Poplarville as collateral, which fact the Bank of Poplarville knew to be true, and said corporation was then insolvent. M. N. McCoy knew nothing about the terms and conditions of the transfer of Rouse Bros. & Smith to H. K. Rouse when he bought the property from H. K. Rouse. It is agreed that H. K. Rouse would testify, if on the stand, that Exhibit A to this agreement is correct, and that he collected of the corporation's money, before the appointment of a receiver one thousand, two dollars and eighty-five cents, and paid on the debts of the corporation of Rouse Bros. & Smith five thousand, five

hundred, twenty-six dollars and seventy-four cents, as shown by Exhibit A hereto. This does not include notes for purchase money of stock of goods which were delivered to Marks, Rothenburg & Co., creditors of Rouse Bros. & Smith. It is agreed that J. F. Williams, attorney, handled the claims of Owensboro Buggy Company, Louis P. Rice & Co., and Ed. V. Price & Co., and that he knows nothing about the alleged payments to the above-named firms. Complainants reserve the right to object to this statement as incompetent."

We are unable to see any fraud on the part of the mercantile corporation, its directors, or the Bank of Poplarville. It seems clear that it was the understanding when the bank canceled its mortgage it was to enable this mercantile corporation to borrow money from the Georgia Savings Association. It is not disputed that, when this transaction was agreed upon, it was also agreed that a second mortgage would be executed in favor of the bank. For some unexplained reason the mercantile corporation did not carry out this part of the contract. It appears, however, that within a few months the real estate was sold at a satisfactory price, and in the transfer of the purchase-money notes the directors of the Rouse Bros. & Smith Company merely made good the agreement that the bank was to enjoy the preference over other creditors than the Georgia Savings Association so far as this real estate was concerned.

We cannot see that this transaction was an effort of the directors to prefer themselves; but, on the contrary, it seems to have been the delayed performance of an admitted obligation.

We believe that the learned chancellor was correct in his conclusions, and the case is therefore affirmed.

Affirmed.

JONES *et al.* v. BARNES.

[66 South. 212.]

1. BANKRUPTCY. *Property of bankrupt. Failure to schedule. Discharge. Effect. Effect of pending actions. Dismissal of appeal. Corporation. Sale of stock. Fraud. Vacation. Ratification.*

Property belonging to the estate of a bankrupt, though not scheduled, will pass to the trustee upon adjudication of bankruptcy, and does not revest in the bankrupt by his discharge.

2. BANKRUPTCY. *Effect of pending actions. Dismissal of appeal.*

Where after the rendition of a final decree in the lower court enjoining defendants from instituting or prosecuting sales on certain promissory notes, the case was appealed to the supreme court, and pending such appeal, one of the appellants was adjudicated a bankrupt and was discharged, he thereby ceased to have any interest in the notes, though they were not scheduled, and hence the appeal as to him should be dismissed.

3. CORPORATIONS. *Sale of stock. Fraud. Vacation. Surrender of consideration. Ratification.*

Where complainant was induced by false representation as to its financial situation to purchase the stock of a company and before finding out the falsity of such representations sold the stock to another, he did not thereby ratify the sale to him so as to prevent him from maintaining a suit to set it aside, and to cancel his notes given to secure a part of the price.

4. CORPORATIONS. *Sale of stock. Rescission. Suit. Return of consideration.*

Where complainant was induced by fraudulent representations to purchase the stock of a corporation, and sold the stock to a third party, receiving from him notes for the purchase price, which notes afterwards turned out to be worthless, such third party having become a bankrupt as did also the corporation, complainant on suing to set aside the transaction for fraud, was not required to return anything to defendants as there was in such case nothing to be returned.

APPEAL from the chancery court of Marion county.
HON. R. E. SHEEHY, Chancellor.

Suit by H. A. Barnes against S. A. & B. C. Jones. From a decree for complainant, defendants appeal.

The facts are fully stated in the opinion of the court.

R. H. & J. H. Thompson, for appellants.

The admitted facts in this case, we submit, entitled the defendants to a decree in their favor and require the reversal of the decree rendered against them by the court below. These facts are: Barnes, the complainant, after purchasing the stock from defendant, operated the business for one month and then sold out his interest therein for more than he paid for it; this he did after being fully advised of the company's financial condition. He did not repudiate his trade, purchased from defendants, as soon as he learned all the facts, but ratified it by selling to Oliver, and thus put it out of his power to return what he had purchased. He does not and never has offered to surrender Oliver's note for five hundred dollars, given for the excess of his selling price over the price for which he purchased, and the same, unless complainant by his own negligence has allowed it to become barred, is yet a claim due him from Oliver's estate being administered in the court of bankruptcy; he has never given defendants a right to propound said claim.

In the cases of *Ware* v. *Houghton, supra,* and of *Jagers* v. *Griffin,* 43 Miss. 134, it is said by our own appellate court, speaking of the general rule, presently to be mentioned, that a rescission of a contract must be sought, if at all, in a reasonable time.

To entitle a party to rescind a contract on the ground of fraud or false representations by the other party, he must do so immediately upon discovering the fraud or false representations, and if he fails to do so, but goes on with the contract after such discovery, he thereby waives his right to rescind, and cannot be relieved from his contract. See Mr. Freeman's note, 35 Am. Dec., 600, and the authorities cited.

Everybody understands that a defrauded party is permitted to rescind a contract only upon the idea that his consent to the contract was never given to the bargain as made; or rather that his consent was obtained thereto by fraud, and that fraud vitiates the consent, and therefore there was no consent.

The contract, the sale of stock by defendant Jones to complainant Barnes, even if it were procured by defendant's fraud, was not void; it was merely voidable. If it were procured by fraud, Barnes could have affirmed the contract on the one hand, or he could on the other hand have rescinded it or sued for its rescission. If he once elected, that was the end of the matter.

He could not both rescind and affirm. In this case after discovering the true condition of affairs, after discovering the fraud, if the sale were fraudulent, he sold what he had bought, at a profit, and turned over to the other the entire affairs of the company; deprived himself of all power over the property and affairs of the company, and has made no effort to restore defendants to the *statu quo* before the sale, and withholds the profit he made by his own of that which he purchased from defendants and has so conducted himself as to deprive not only himself but the chancery court, whose aid he invokes, of all power to restore to defendants the property which he purchased from them, or to compensate them for its loss. If a fraudulent sale, conceding for sake of argument it was fraudulent, was ever affimed, Barnes we submit, affirmed his purchase from defendants. We ask that the decree appealed from be reversed, the injunction dissolved, complainant denied all relief, and the cause remanded solely for the allowance of damages on the injunction bond.

Whitfield & Whitfield, for appellee.

The most important consideration to which we address especially the attention of the court, is the fact shown

by the evidence, overwhelmingly, that Barnes never knew, until after suit was brought upon these notes, that the corporation was insolvent; that the statement furnished to him was a tissue of falsehoods, and that all the representations made by Jones, to him which induced the purchase, were, every single one of them, absolutely false. There was nothing for him to offer to return. His notes were absolutely worthless, not worth the paper they were written on, for the reason that the consideration, the mill property, was absolutely worthless. He had received nothing, and there was nothing to return.

It is really amusing to notice the two cases which learned counsel cited in their stress. Those cases are, *Ware* v. *Houghton,* 41 Miss. 370, and *Jagers* v. *Griffin,* 43 Miss. 143, and they are cited for the single purpose of showing that one who seeks a rescission of a contract, must do so within a reasonable time.

Now, what would the court suppose are the facts in those two cases? They are both cases of attempts to avoid notes for the purchase money of slaves made in 1859 and 1861, and to overthrow the judgment of the probate court ordering the sale. The history of that old probate court is certainly familiar to this court. The irregularities and voidness of its procedure is common knowledge. But specifically, let us say that in the case of *Ware* v. *Houghton,* the rescission was not sought until 1866, when the notes were dated December 16, 1859, seven years after, and in this case the court said: "But when parties have slept on their rights for over six years; when the statute of limitation would, itself, have made their title perfect, by cutting off all remedy from those supposed to possess the superior title, they present themselves in such attitude as to have no claim to the favorable consideration of a court of justice. The rule of diligence ought to be the more stringent where the means of information are of record in the county and where the title is deduced under the judgment or decree

of a court easy of access, and open at all times for examination."

In the case of *Jagers* v. *Griffin,* the notes were made in January, 1861, but the effort to rescind never occured until after April 19, 1866, over five years. Now, let us ask the court this question. What earthly application to the facts of this case, have these two cases, where the efforts to rescind were not made until five years or seven years after, and where the facts showing the voidness of the sales attacked, were "of record, in the county, of easy access, open to examinations of all"? In this case before the court, there was no record. The facts were not easy of access. They were not open to all, and the complainant never knew the utter falsehood of the statements, on the faith of which he bought, until after the appellant had the temerity to bring suit, on their fraudulently induced notes. The cases cited are utterly irrelevent. What is aid by the learned counsel in respect to Barnes ratifying the sale, by this sale to Oliver, is a mile from the mark. When Barnes made his sale to Oliver, the evidence clearly, and overwhelmingly shows that he had no knowledge whatever, that the representation in the statement, made to him, by Sanford Jones, through Featherston, were false. He had never heard of the seven thousand dollar debt to Hawkins. He did not know that the ten dollar stumpage claim was fictitious to the extent of fully three-fourths of its value. He did not know that the corporation was then utterly insolvent, owing five times the amount of debts at least, represented, nor many other most important facts.

One cannot ratify, without complete and full knowledge of all the facts affecting the matter which he is said to ratify. Citations to this effect will be useless. The able counsel representing the appellants are surely hard bested when they can say no more for their cause than appears in their very prefunctory brief. We do not say this by way of criticism. It was not possible for coun-

sel to write a brief in this cause which could be otherwise than prefunctory, for this appeal is most manifestly prosecuted solely for delay, and is absolutely without any merit at all. Barnes, it seems has gone to his reward since this litigation was impetrated.

REED, J., delivered the opinion of the court.

ON PLEA IN BAR.

A plea in bar as to appellant S. A. Jones was filed in this case. It is as follows:

"Now comes the appellee, H. A. Barnes, by his attorneys, and shows to the court that after the trial of this cause in the lower court, to wit, on February 29, 1912, the appellant S. A. Jones filed a petition in bankruptcy, whereby he voluntarily, in accordance with the acts of Congress in that behalf made and provided, assigned to a trustee in bankruptcy all his property other than that exempt from execution at law, and there was included in said assignment, by operation of law, all the interest of said bankrupt in each and every of the several notes sued on in this cause, and on which the appellant, S. A. Jones, is seeking a judgment against this appellee, and the said S. A. Jones now has no interest in said notes, and has not had any interest therein since the filing of said petition in bankruptcy, and the said S. A. Jones now has no interest in this cause which will entitle him to prosecute this appeal; and this the appellee is ready to verify. Wherefore the appellee prays that this cause, as against the said S. A. Jones, may be dismissed."

Appellant S. A. Jones filed a replication to the plea in bar, in which he says that "all and singular the averments of said plea are untrue."

An agreed statement of facts is on file, and for our consideration upon the hearing of the plea. It reads:

"(1) After the rendition of the final decree appealed from in this case, enjoining the appellants from institut-

ing or prosecuting suits on the promissory notes mentioned in the pleadings, the said S. A. Jones was adjudged a bankrupt by the United States District Court, Southern District of Mississippi, Southern Division, at Biloxi.

"(2) That the said S. A. Jones did not schedule the notes above mentioned, or either of them, as constituting a part of his assets, and in fact his schedule showed no assets above those which were exempt. At the same time the schedule of his debts showed that he owed two thousand, six hundred, twenty-six dollars and twenty-nine cents.

"(3) It appearing at the first meeting of the creditors that there were no assets, the estate was ordered closed. No trustee was appointed under the circumstances, as none appeared to be needed.

"(4) Afterwards, and before the prosecution of the appeal in this case, the said S. A. Jones was discharged as a bankrupt, and after receiving his discharge it was that he, together with his coappellant, prosecuted the appeal in this case."

As to the present hearing on the plea in bar, this case is controlled by the decision in the case of *Juden* v. *Nebham,* 103 Miss. 84, 60 So. 45. Therein it was decided that property belonging to the estate of a bankrupt, though not scheduled, will pass to the trustee upon adjudication of bankruptcy, and does not revest in the bankrupt by his discharge. The bankrupt in that case had not scheduled the note sued upon among his assets, and no trustee was appointed, because no assets were shown. He was finally discharged, and we held that he was divested of his ownership of the note, and consequently deprived of his right to recover. When appellant S. A. Jones was adjudged a bankrupt, all of his title and ownership in the notes involved in this action passed out of him, and was not revested in him upon his discharge. When his

ownership in the notes ended, his right to proceed in a case involving the notes was also at an end.

The plea in bar is sustained.

ON THE MERITS.

We find in the record an agreement by counsel for the appellants and for the appellee that this case be submitted for hearing on two issues: (1) On the plea in bar to the appeal of S. A. Jones, one of the appellants; and (2) on the merits of the case. We have decided the first issue by sustaining the plea in bar.

Appellee filed his bill in chancery against appellants to restrain them from prosecuting two suits then pending in the circuit court, and from filing other suits on certain notes given them by appellee in payment for a part of the capital stock in a sawmill company, also for the purpose of rescinding the contract of sale of the stock, and for the purpose of having the notes declared void for the want of consideration and because their execution was induced by fraudulent representation. The bill, which contains, at length, averments showing the false and fraudulent representations which it is alleged were made by appellants in connection with the contract of sale, was fully denied by appellants in the answer which they filed, and which answer they made a cross-bill, praying judgment against the appellee for the entire sum of the notes given by him for the purchase price of the stock.

The case was tried by the chancellor, and submitted for his decision, upon issues of fact. The finding shown in the final decree is that the giving of the notes "was induced by misrepresentation, and that the property sold to the complainant was worthless." He denied the prayer of the cross-bill, and granted that the bill of complaint, perpetually enjoining appellants from prosecuting any further suits on the notes, directing the delivery of the notes by appellant for cancellation and return to appellee, and declaring the notes to be void. The decision

of the facts in this case by the chancellor favorable to the appellee is supported by the evidence and will not be disturbed.

Appellants contend that there was an affirmance of the contract of sale by appellee, because after purchasing the stock from appellants he operated the business for one month, when he sold his interest to R. C. Oliver, who was one of the organizers, with appellants, of the sawmill company, and held one-half of the capital stock therein. But there is ample evidence to show that appellee did not know, when he was operating the business, that the statement made to him of the financial condition of the company at the time of the sale of the interest in the capital stock was false, and that the representations then made by appellants were not true. The statement referred to was in writing, and is an exhibit in the record. This statement showed that the company had a clear capital stock of ten thousand dollars, which was not true. The company was then practically in failing condition. The statement did not show the correct financial situation of the company. For instance, there was no mention in the statement of a liability consisting of an indebtedness to G. L. Hawkins secured by a collateral pledge of the capital stock of the company amounting to seven thousand dollars. There were other representations made to appellee at the time, which were shown by the testimony to be false, and which he had no knowledge of until after his connection with the business had ended. Under the facts in this case, and in the absence of the knowledge of the false and fraudulent representations, it cannot be said that his connection with the mill for the short period of one month could be a ratification of the contract which would amount to an affirmance thereof by him.

We do not see that there was any unreasonable delay on the part of appellee in rescinding the contract of sale. It is shown in the record that he did not know of the real financial condition of the company until some time after

his deal with Oliver. In fact, he testifies that he did not know of the omission from the statement shown him of the large indebtedness to Hawkins until after he had disposed of his interest to Oliver and Oliver had closed the mill. The suits were brought by appellants shortly after he received this information from Oliver. Knowledge of other misrepresentations were not received by appellee until after he was sued by appellants. He did nothing to ratify the contract after he discovered the fraud practiced upon him. There was no delay, in view of the particular circumstances of this case, in rescinding, which is unreasonable, and which will amount to an affirmance.

Nor can it be said that there was a consideration in this case which should be returned by appellee as a condition precedent to the right to rescind. The evidence shows that, while he made a trade for his interest in the company with Oliver and received notes to evidence the amount due therefor, he did not collect anything thereon and that the notes were worthless; Oliver having failed and gone through bankruptcy. In truth, it is shown that the sawmill company and S. A. Jones, as well as Oliver, failed and were adjudged bankrupts. Appellee received nothing whatever of any value from his purchase of the stock at all. He did not receive the stock at all. There was nothing to be returned.

When we sustained the plea in bar as to appellant S. A. Jones, the appeal was thereby dismissed as to him. The case then remained on the docket for hearing as to the other appellant, B. C. Jones. The dismissal of the appeal of S. A. Jones did not carry with it the dismissal of the appeal of his coappellant, B. C. Jones.

We find no error in the trial of this case, and it is affirmed.

Affirmed.

HOOVER COMMERCIAL CO. *v.* HUMPHREY.

[66 South. 214.]

1. SET-OFF AND COUNTERCLAIM. *Claims based on denial of plaintiff's right. Mutuality of claims. Appeal and error. Harmless error. Submission of issues.*

Code of 1906, section 745, providing that, where a mutual indebtedness exists between plaintiff and defendant, defendant may plead and set-off against the demand of plaintiff any debt which he may have against plaintiff, contemplates a mutual indebtedness between the parties. This implies that there was a dealing together between them, so that each became indebted to the other. "Mutual" means reciprocally acting, giving, receiving, interchanging, so that a claim of set-off based upon a total denial of plaintiff's right of action cannot be pleaded.

2. WORDS AND PHRASES. *"Mutual account."*

A mutual account is one in which there must be reciprocal demands and charges by each party against the other, like accounts between merchants. If the demand is only on one side, the account is not mutual.

3. SET-OFF AND COUNTERCLAIM. *Recoupment. Necessity of mutuality of claims.*

Recoupment is a defensive, rather than an offensive, proceeding. It has in view a claim in behalf of each contending party. It will not apply, where it is necessary to show that plaintiffs have no right of action, in order to sustain defendant's claim.

4. APPEAL AND ERROR. *Harmless error. Submission of issues.*

In a suit for damages caused by a seller's failure to deliver cotton of the grades contracted for, if the court erred in instructing the jury to disallow defendant's claim of set-off based on plaintiff's refusal to accept the cotton tendered, which it alleged was of the grades contracted for, such error was harmless, where evidence as to defendant's loss by the rejection of the cotton was admitted, and the question whether the cotton tendered was equal to the sample by which it was sold was clearly submitted to the jury and decided against the defendant.

APPEAL from the circuit court of Holmes county.
HON. MONROE MCCLUER, Judge.

Suit by W. H. Humphrey, survivng partner of Humphrey's & Co., against the Hoover Commercial Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Noel, Boothe & Pepper, for appellant.

The court erred in excluding the evidence offered by appellant in the way of set-off and recoupment, based on evidence that cotton similar to that contracted for was tendered to appellees and rejected, except two bales, and the rejected portion sold at a loss of two hundred and forty dollars. The idea of the lower court that no offset is permissible unless some liability of defendant is admitted, is directly contrary to the recent holding of this court. *Hairston* v. *Montgomery,* 59 So. 793.

The defense excluded by the court, or rather the counterclaim, for two hundred and forty dollars amounts to rejection of the testimony offered in behalf of appellant, and was a ruling not only as to the nature of the defense, but as to weight of evidence sustaining it, and was erroneous. *Adams Mch. Co.* v. *Thomas,* 87 Miss. 391; *Bank of Greenville* v. *Kreitchmer,* 91 Miss. 617.

There was no cotton delivered, no money paid and no writing signed at the time of the oral trade for the cotton; and according to the testimony of appellee, as well as of appellant, there was no specific agreement made as to the weight of the cotton, nor as to the number of bales of any particular grade to be delivered, nor the number to be delivered or received at any particular price. The uncertainties as to quantity and price of any specifiy grade, along with the oral features renders this contract invalid. *Berry* v. *Waterman,* 71 Miss. 499; *Williams* v. *Sayers,* 79 Miss. 52; *Crystal Ice Co.* v. *Holliday,* 64 So. 659.

We respectfully submit that the court erred in excluding the set-off and counterclaim, available under the

pleadings, either as a set-off, or recoupment; and that the court thereby ruled, in effect, on the weight of the evidence offered to sustain the line of defense made by appellant, as well as the availability of the counter-claim, in either aspect of the case; and that the court also erred in holding that the oral contract, as embodied in appellee's instruction was also valid.

Elmore & Ruff, for appellee.

The argument of appellant is addressed to three propositions, of which the first is: "The court erred in excluding the evidence offered by appellant in the way of set-off and recoupment, based on evidence that cotton similar to that contracted for was tendered to appellees and rejected, except two bales, and the rejected portion sold at a loss of two hundred and forty dollars."

The court did not exclude such evidence. Objection was made to it so far as it tended to support the notice of the claim of set-off. The ruling of the court on that objection was reversed and never announced. So then if plaintiffs have a cause of action, defendant has none. The existence of either absolutely negatives the existence of the other. They cannot coexist. The world is not large enough for them to exist at the same time.

There is no question about two or more inconsistent pleas; but the notice of set-off is inconsistent with itself. It makes allegations in necessary support of defendant's claim which if true destroy the foundation of plaintiff's claim; and then asks to set-off defendant's claim against plaintiff's demand.

It would be an impossibility to write a set-off or recoupment instruction in pursuance of or on the principle of defendant's notice. To illustrate, the instruction which undertook to prevent defendant's idea of the case, has not a single point of resemblance to an instruction on recoupment or set-off.

It is impossible that defendant had any right of set-off under the circumstances of this case. "The princi-

ple of set-off is unknown at common law. The right of set-off in the practice of this country is derived from the statutes of the different states, and the mode of availing of that right is also provided by their statutes." *Henry* v. *Hoover,* 6 S. & M. 418. See, also, 34 Cyc. 626; *Myer* v. *Estell,* 47 Miss. 23; *Telephone Co.* v. *Cox.,* 103 Miss. 546. We must therefore have recourse to the statute which will determine in what cases set-off is allowable.

Section 745 of the Code is the general section on set-off and its terms plainly do not include such a case as the present one. It applies to but one general class and that class is "Where a mutual indebtedness exist between the plaintiff and defendant." It provides for the judgment where the demands equal each other; where the demand of the plaintiff exceeds that of defendant; and where the demand of defendant exceeds that of plaintiff. But it does not contemplate a case where the very basis of defendant's demand shows that plaintiff never so much as had a demand.

The language of the above section is almost identical, so far as the point here discussed is identical, with section 687 of the Code of 1892; section 1551 of the Code of 1880; section 601 of the Code of 1871; and article 98, on page 493, of the Code of 1857. The language of section 63 on pages 874 and 875 of Hutchinson's Mississippi Code differs, but it shows that the cases contemplated are where plaintiff and defendant "be indebted to each other." The statutes and adjudged cases always refer to instances where plaintiff has a demand for which judgment would follow but for a demand on the part of defendant which satisfies plaintiff's demand *pro tanto.* Of such kind, it is submitted, is the case of *Haiston* v. *Montgomery,* 59 So. 793, referred to in appellant's brief.

The present case, it is believed, cannot be distinguished in principle from *Shewalter* v. *Ford,* 34 Miss. 418. In that case plaintiff paid three hundred dollars

in cash and gave his note for seven hundred and fifty dollars to defendant for the purchase money of a slave warranted to be sound. In fact the slave was diseased at the time of the sale and soon died. Plaintiff brought an action for the part of the purchase money paid in cash and also for expenses incurred for medical attention to the slave. Defendant denied the alleged unsoundness of the slave at the time of the sale and filed with his answer the note for seven hundred and fifty dollars and demanded judgment for the same.

It is equally obvious that the notice cannot be treated or regarded as in the nature of recoupment. As will be noted in the case of *Myers* v. *Estell* and *Telephone Co.* v. *Cox, supra,* recoupment is strictly defensive as distinguished from an offensive proceeding. It has for its purpose either a reduction of plaintiff's claim or its cancellation by applying a claim of defendant arising out of the same transaction, whether liquidated or unliquidated, in satisfaction *pro tanto* of plaintiff's demand. It has no field of operation in this case, because it contemplates as an essential to that operation that plaintiff shall have a cause of action and that defendant shall have a claim which he may oppose in mitigation, reduction or full satisfaction of plaintiff's demand. It cannot apply where the fact upon which it is alleged absolutely negatives the fact upon which plaintiff's demand is based. It clearly contemplates the existence at the same time of a claim in behalf of each of the opposing parties. It does not apply when the fact upon which it is based of necessity shows that the plaintiff never had a cause of action. See *Dunham* v. *Bower* (N. Y.), 33 Am. Rep. 573. It is therefore submitted that defendant's notice under the general issue was of such character as to be wholly unwarranted on either the principle of set-off or recoupment.

The second argument of appellant is that "The defense excluded by the court, or rather the counterclaim

1912; and Mr. J. T. Montgomery said the good middling would have brought fourteen and one-eighth cents and the strict middling would have brought one-half cent less, or thirteen and five-eighths a pound. The jury was amply warranted in fixing the damages at the sum for which the verdict was rendered, whether it had all been strict middling or all good middling or whether any part of the fifty bales had been one or the other, the loss of plaintiffs being practically and substantially the same on either grade.

No objection was made on the ground of variance. As to the oral features of the contract, it seems sufficient to say that the statute of frauds was not pleaded nor was there any objection to the evidence introduced to prove the oral contract. The case of *Berry* v. *Waterman,* 71 Miss. 499, and *Williams* v. *Sayers,* 79 Miss. 52, cited by appellant, both turned on the point as to whether title had passed; and not on whether the contract itself was valid for the purpose of grounding an action for damages thereon.

Since, by the instructions, the jury was limited in assessing damages to the difference in the contract price and the market value of the cotton at the place and time of delivery as postponed and as profits as such, did not enter as an element of damages, the case of *Crystal Ice Co.* v. *Holliday,* 64 So. 659, also cited by appellant, is authority for appellee on the enforceable validity of the contract even had the statute of frauds been pleaded.

REED, J., delivered the opinion of the court.

This is an action brought in the circuit court by appellees, cotton buyers, against appellant, a mercantile corporation, to recover damages for breach of an oral contract of sale of fifty bales of cotton, to be delivered at a future date. The declaration alleges that the cotton was to be of certain grades, shown by samples at the time the contract was made; that the bales were to weigh

five hundred pounds each, and that the delivery was to be made during the month of November, 1911; that fifty bales were tendered by appellant, but only two were of the required staple, and appellees refused to accept, and rejected, the remaining forty-eight bales; and that appellant failed to carry out its contract and deliver the balance of the cotton. Appellants demanded judgment for seven hundred and twenty dollars, the amount they claimed as damages.

To this declaration appellant filed a plea of the general issue, and gave notice thereunder that appellees were indebted to appellant in the sum of two hundred and forty dollars, being the amount of its loss from having to sell the forty-eight bales of cotton rejected at a price less than stipulated in the contract of sale; appellant averring that the cotton tendered and refused would class equal to that of the samples shown, and should have been accepted by appellees. To further show appellant's claim of set-off, we quote the concluding part of its notice, as follows:

"And that said defendant will set off and allow the said plaintiff on the said trial so much of said sum of two hundred and forty dollars so due and owing from the said palintiffs to the said defendant against any demand of said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, and for judgment over in favor of defendant for the excess, according to the form of the statute in such cases made and provided; and will give in evidence that the sale set forth in this notice was the only controverted sale of cotton made by defendant to plaintiffs, and that performance, according to sample, was tendered and rejected, defendant offering to comply fully with its contract and tendering performance according to its terms."

Upon the trial the jury returned a verdict in favor of appellees for the full amount claimed. It is contended that the court erred in granting an instruction

directing the jury to "disallow the claim of defendant insisted on by way of set-off."

The claim of the plaintiff for damages from breach of contract presented in their declaration and the claim of defendant for damages from breach of contract as presented in its set-off are each based on one and the same transaction. Plaintiff entered suit against defendant for failure to deliver cotton of the staples contracted for. Defendant, by its set-off, sought to recover from plaintiff for failure to accept the cotton because it was of the staples shown by the samples. Defendant, in its plea of general issue, denied plaintiff's right of action *in toto.* Could it at the same time, by way of set-off, present the defense shown in its notice?

The law touching the plea of set-offs is found in the statutes of the state. It was said in the case of *Henry* v. *Hoover,* 6 Smedes & M. 418, that:

"The principle of set-off was unkown at common law. . . . The right of set-off in the practice of this country is derived from the statutes of the different states, and the mode of availing of that right is also provided by their statutes."

Our present statute (section 745 of the Code of 1906) reads:

"Where a mutual indebtedness exists between the plaintiff and defendant, the defendant may plead and set-off against the demand of the plaintiff any debt . . . which he may have against the plaintiff."

This language is practically the same in the Codes of 1892, 1880, 1871 and 1857.

It will be seen that the statute contemplates a mutual indebtedness between the parties. This implies that there was a dealing together between them, so that each became indebted to the other. "Mutual" means reciprocally acting, giving, receiving, interchanging.

A mutual account is one in which there must be reciprocal demands, charges by each party against the other,

like accounts between merchants. If the demand is only on one side, the account is not mutual.

The question now before us was fully dealt with in the case of *Shewalter* v. *Ford,* 34 Miss. 417. In that case action was brought to recover a part of the purchase money of a slave, because of the breach of warranty of soundness, the slave having died shortly after the purchase from disease existing at the time of the sale. The defendant denied the unsoundness of the slave, and filed with his answer a note evidencing the balance of the purchase price, and demanding judgment thereon against the plaintiff. The court decided that set-off was not a proper defense, holding that a defendant could not deny *in toto* the plaintiff's right of action, and at the same time set off in his answer a substantive and independent cause of action, inconsistent with plaintiff's claim, and involving the justice of its issue and legality, and which of itself amounts to an assertion that the plaintiff's demand is ill-founded. We quote, as follows, from the opinion delivered in that case by Judge HANDY:

"The claim set up in the answer could be regarded in but one of two lights; either as a set-off, or as a cross-action. It is plain that it cannot be considered as a set-off because it is based upon a total denial of the plaintiff's right of action, and has no feature of a claim for an allowance against the sum which the plaintiff might recover; and if it could be regarded as a set-off, under our laws upon the subject, it required no replication. If it be regarded as a cross-action to recover the amount of the note, as was clearly the object, it could not be entertained; for, under no rule of practice known to our laws, can a defendant be permitted, in a case like this, to deny *in toto* the plaintiff's right of action, and, at the same time, to set up a substantive and independent cause of action inconsistent with the plaintiff's claim, and involving the issue of whether the plaintiff's demand is well-founded or not, and demand judgment upon the

ground that the plaintiff's claim is ill-founded. Hence the court acted properly in disregarding this part of the defendant's answer as immaterial."

It will be noted that since the decision in the case of *Shewalter* v. *Ford* the statute authorizing the plea of set-off has been several times re-enacted, and included in the several codes adopted since that date. By such enactment it appears that the legislature has adopted, along with the statute, the construction given by the decision in that case.

It is clear that the claim of set-off interposed by defendant in this case is "based upon a total denial of the plaintiff's right of action." It cannot be a claim for an allowance against any sum which plaintiff might recover. If plaintiffs have a right of action, then defendant has none. The existence of the right in either of the parties negatives the existence in the other. There was not a mutual indebtedness between the parties. Following the holding in *Shewalter* v. *Ford, supra,* we decided that the trial court did not err in instructing the jury to disallow the claim of appellant insisted on by way of set-off.

The notice filed by appellant can hardly be regarded as in the nature of recoupment. That is a defensive, rather than a offensive, proceeding. It has in view a claim in behalf of each contending party. It will not apply in this case, where it is necessary to show that plaintiffs have no right of action to sustain defendant's claim. *Myers* v. *Estell,* 47 Miss. 4; *Hayes* v. *Slidell Liquor Co.,* 99 Miss. 583, 55 So. 356; *Telephone Co.* v. *Cox,* 103 Miss. 541, 60 So. 641.

Even if it could be held that the court erred in giving the instruction complained of, we do not see that appellant has been harmed thereby. The appellant's testimony, touching its loss by the rejection of the forty-eight bales, was not excluded from the jury. The issue of the breach of the contract was clearly presented, and

its submission to the jury was upon the testimony introduced. Was the cotton tendered equal to the sample? This was the question for decision by the jury. The verdict of the jury resolved it against appellant. The instruction did not interfere with a decision as to whether appellant performed or breached the contract.

Affirmed.

HARDEE v. BROOKS *et al.*

[66 South. 216.]

1. DRAINS. *Organization of district. Jurisdiction. Injunction. Remedy by appeal. Proceedings. Objections.*

Where a petition is filed with the chancery clerk of a county under chapter 197, of the act of 1912, entitled, "An act to create additional methods of organizing and maintaining drainage districts and providing for the validity of any drainage district heretofore organized under chapter 39, of the Code 1906, that may come under the provision of this act," this does not confer any jurisdiction to create a district under sections 1682-1727, since a landowner examining the petition in which the statute under which the district is to be created is designated, is entitled to rely upon its being created in accordance therewith, and might seriously object if it were created under some other statute having different provisions.

2. INJUNCTION. *Remedy by appeal. Proceedings. Objections.*

The fact that the owner did not appear and object at the hearing of a petition for the creation of a drainage district, nor appeal to the supreme court from an order establishing such district, does not preclude him, on the filing of a bill to enjoin the issuance and sale of bonds of the established district, from questioning the courts jurisdiction to establish the district, where such questions was one of law to be determined by an inspection of the record, although if the objection raised only a question of fact, the chancellor's decision at the hearing could only be reviewed by appeal.

APPEAL from the chancery court of Bolivar county.

HON. M. E. DENTON, Chancellor.

Bill for injunction by W. G. Hardee against J. C. Brooks and others. Injunction denied, and bill dismissed and complainant appeals.

The facts are fully stated in the opinion of the court.

Charles Clark, for appellant.

The organization of drainage districts is a statutory proceeding and in pursuing the remedy laid down by the statute, the chancery court acts as a court of special limited jurisdiction and in all of its proceedings in the organization of drainage districts, it is bound by the statute which must be strictly construed. The petition in this case was for the organization of a drainage district under an entirely different law from that of chapter 39 of the Code and the chancery court had no jurisdiction to proceed under said petition. And by assuming jurisdiction, its acts were not validated. Under the chapter mentioned in the petition for the organization of a drainage district, the chancery court had nothing to do with its organization, but the same is organized through the county board of drainage commissioners and the fact that the clerk gave notice as provided by chapter 39 and the fact that the court assumed jurisdiction and proceeded, did not prevent all of its acts from being void. The fact that Mr. Owen, attorney for the petitioners, requested the clerk to proceed under chapter 39 of the Code, did not give the chancery court authority to proceed.

When the notice was published for the hearing of said petition the fact that the chancellor could not be there, did not authorize the publication of the second notice fixing a different date. The law provides that the meeting shall be adjourned to a subsequent date, but makes no provision for republication, and the second publication and the hearing on it, was without authority of

law and therefore null and void and the judgment of the court entered thereon was necessarily void.

In giving notice for the date of the hearing on the assessment roll, the date was fixed for the 19th day of September, and while it is shown that it was found that the chancellor could not be present and a new date was fixed, it did not give any validity to the second notice because it was made without any authority of law and all the proceedings and judgment of the court approving the assessment roll were made without any authority of law and were null and void. The proof as to this second notice would give the court no authority to act because it is shown by the affidavit of the editor of the paper that it is impossible for him to furnish a copy of the notice as published because of the loss of his paper from his files, and in order to give the legal notice and the proof of it, it is necessary to have a copy of the notice attached to the proof of publication. For the above reasons I submit that the whole proceedings were void and that the injunction should have been granted.

Thos. S. Owen, for appellee.

The question involved in this suit, or rather the objections, are fully answered by the decision of this court in *Wheeler & Silber* v. *Bogue Phalia Drainage District,* 64 So. 375. The court, in that case, as to all of the objections which were more meritorious than the objections made here, held in effect that the failure to appeal within the time required by law, where a party had notice of the proceedings, precluded any objections to the proceedings as passed upon by the chancellor. In the Wheeler & Silber case it was urged that the court had no jurisdiction because no petition signed by the required number was ever presented and it was urged with authorities that the decision could not be *res adjudicata* as to this because the court had never acquired jurisdiction. There were numerous other objections raised in that case that do not

apply here to this record, and to all of the objections the court held that the failure to appeal within the time required, barred the right to object to any of the various steps in the proceedings. If you would concede for the sake of the argument that the notice published in September, 1913, giving date of the hearing on the 19th day of September, was the only legal notice published and that the hearing on the 26th day of September was without any notice at all, still the case must be affirmed for the reason that it was at most a defective notice and was cured by section 1711, Code of 1906, as held by this court in *Wilkinson* v. *Lee,* 51 So. 718, and as repeatedly held in regard to hearings on assessment rolls in this state, that where the party has notice of the proceedings it is his duty to follow said proceedings and if he had followed them in this instance, even without the notice of the hearing on the 26th day of September being published, he would have ascertained the facts and could have had his appeal to the supreme court as provided by the statute, but when he prefers to ignore the proceedings until the work is about to be begun in the district he is precluded because of his failure to appeal. In fact, it is the established law of this state in proceedings under chapter 39 of the Code, as declared in the Wheeler & Silber case above quoted, that the failure to appeal in the manner required by the provisions of chapter 39 and its amendments precludes a party from raising this question; in fact the decree if not appealed from within ten days, is *res adjudicata.*

SMITH, C. J., delivered the opinion of the court.

Appellant filed his bill in the court below praying that appellees, who are drainage commissioners of Bolivar county, be enjoined from issuing and selling bonds of the Deeson drainage district. The cause was submitted on bill, answer, and agreed statement of facts. The injunction was denied, and the bill dismissed.

In September, 1912, a petition was filed with the chancery clerk of Bolivar county, "praying for the organization of a drainage district under chapter 197 of the Acts of 1912, entitled 'An act to create additional methods of organizing and maintaining drainage districts and providing for the validating of any drainage district heretofore organized under chapter 39 of the Mississippi Code of 1906 that may come under the provisions of this act.' " The attorney, who had been employed by the landowners, who signed this petition to obtain the organization of the drainage district, decided to have it organized under the provision of chapter 39 of the Code (sections 1682-1727), and by his direction the notice required by this chapter of the Code for the hearing of the petition was given by the chancery clerk, and, on the day appointed for the hearing, the chancellor took up the matter for consideration, and in due course entered the necessary orders and decrees necessary for the creation of the district. Chapter 197 of the Acts of 1912 provides for the formation of a drainage district by three commissioners and not by the chancellor, and is materially different also in other respects from the Code chapter. The petition in each instance, however, must be filed with the chancery clerk, who fixes the time for the hearing and posts and publishes notices thereof.

One of the objections to the issuance of these bonds is that the orders creating the district are void for the reason that the chancellor was without any jurisdiction to enter them. This objection is well taken. All of our drainage statutes provide that districts shall be created upon the filing of petitions signed by the necessary number of landowners praying therefor. The filing of such petition is jurisdictional, and without it neither a chancellor, board of supervisors, nor commission, as the case may be, has any power whatever to create such a district. It may be that it is not necessary to designate in the petition the statute under which the district is to be

created, as to which we express no opinion; but, if the statute is so designated, then the jurisdiction conferred by the petition is only to create a district in accordance with the provisions of that particular statute.

A landowner examining the petition in which the statute under which the district is to be created is designated is entitled to rely upon its being created in accordance therewith. He is only called upon to appear at the hearing of the petition when he objects to the creation of the proposed district; and it might well be that he would have no objection to a district such as is provided for by the designated statute, and therefore would not appear at the hearing and object to its creation, but would very seriously object to such a district as is provided for by some other statute.

But it is said that appellant's only remedy was to have appeared at the hearing and object to the creation of a district and, in event that his objection was overruled, to then appeal to this court. It is true, as was held in *Wheeler & Silber* v. *Bogue Philia Drainage District*, 64 So. 375, that, if the objection here under consideration raised a question of fact, the chancellor's decision thereon at the hearing could be reviewed only on an appeal therefrom; but the question raised, instead of being one of fact, is one of law to be determined by an inspection of the record, from which it affimatively appears that the chancellor was without jurisdiction to proceed in the matter. The petition, by its recitals, did not even attempt to confer such a jurisdiction upon the chancellor, but conferred it solely upon the commissioners provided for in the statute designated.

The decree of the court below is reversed, and a decree will be entered here in accordance with the prayer of appellant's bill.

Reversed.

DAVIS v. LAMAR COUNTY.

[66 South. 210.]

COUNTIES. *Claims. Presentation to board of supervisors. Statute. Construction.*

Under section 311, Code of 1906, all claims against a county, whether based upon torts or contracts, whether the damages claimed are liquidated or unliquidated, must first be presented to the board of supervisors before the claimant can appeal to the courts. The county must have official notice of the claim and a chance to adjust the same.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Suit by H. Davis against Lamar county. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Tally & Mayson, for the state.

We have never before heard the contention advanced that section 311 applied to any sort of a claim against the county, except actions arising *ex contractu.* The appellant here was suing for a tort, pure and simple, to recover unliquidated damages; so then it would have been useless, and the law never contemplated that the party claiming to be damaged should present a claim to be passed upon. It is different where the claimant's relations to the board is that of a contractor. If he is a contractor, why, then the amount to which he would be entitled must have been agreed upon in advance, and the only question that could be raised with the board would be as to whether the contract had been executed according to its term. It is also to be observed that whether it was or was not necessary to lodge a claim with the board for injuries of this character, that the proposition

as to whether it was done or not is a matter of proof to be raised by pleas, because the presentation and rejection of the claim could rest in parol. *Brookhaven* v. *Lawrence County,* 55 Miss. 189.

Salter & Hathorn, for appellee.

What was the legislative intent and purpose in enacting said section 311 of the Code of 1906? Evidently said section was intended and designed to protect and guard the county against the expense of unnecessary litigation by giving it the right and opportunity of having claims of whatever kind and character presented to the board of supervisors, and thereby enabling the county to settle meritorious demands or claims without suit. We can conceive of no other reason or necessity for the existence of said section. What good or valid reason can be advanced for having "claims," based upon matters arising *ex contractu,* presented to the board of sueprvisors for adjudication, thereby affording the county an opportunity to avoid the expense of litigation and at the same time, denying the county the same right and privilege upon "claim" arising out of matters of tort, for no other reason than that such claims represent unliquidated damages? We submit that the proposition is absurd upon its very face. The same necessity exists for protecting the county from the expense incident to suits based upon matters arising out of torts, as in cases of claims *ex contractu.* Such course would certainly defeat, to a large extent, the legislative intent, prompting the legislature to enact said section.

So far as we are able to ascertain from an exhaustive search of the records, and a careful study of the very able briefs of counsel for appellant, our supreme court has never been called upon to pass upon the precise question of whether or not there exists a distinction under section 311 of the Code of 1906 between "claims" *ex contractu,* and those based upon torts. But the general rule

is that a county is not liable for torts, in the absence of statute expressly or by necessary implication, declaring the liability. 7 Am. & Enc. of Law, 41; 11 Cyc., 497; 54 Miss. 363.

We have no statute expressly nor by necessary implication, declaring a county liable for torts. Our legislature has, however, in its wisdom provided a remedy by which when ones own property has been injured or destroyed, he may obtain redress for his injury. But to avail himself of the benefits thereof, he must comply with all the provisions of the statute. The legislature has said that one having a just claim against the county shall present it to the board of supervisors, for allowance, as a condition precedent, to bringing suit. The requirement is a just and reasonable one, and until a party has met the requirements of the statute, no court hath jurisdiction to entertain his suit. Counsel for appellant, says in their brief, that even if it is necessary to present the claim to the board of supervisors for allowance that the question of whether or not it was so presented is a question of proof, and cannot be raised by demurrer, and they cite the case of *Brookhaven* v. *Lawrence County*, 55 Miss. 189, in support of their contention. We have examined closely and carefully that decision and find that the question of the necessity for the averment that it had been presented to the board of supervisors for allowance being made in the declaration was not in issue and was not passed upon by the court at all. The only thing decided by that case was that the plaintiff was not bound by the minutes of the board of supervisors, but that he could show by parol evidence that the claim was presented to the board for allowance. However, the supreme court has spoken in no uncertain terms upon the precise question involved, and has said that the plaintiff must aver in his declaration that the claim has been presented to the board of supervisors for allowance and by them rejected, and that failing to so aver in the declaration, renders the

same subject to demurrer. *Board of Supervisors of Lawrence County* v. *City of Brookhaven*, 51 Miss. 68, 72.

It was, and is yet, our contention that the word "claim" as used in section 311 of the Code of 1906, embraces demands of every kind and character. As we have already said, we fail to find where our court has spoken in the matter, but the courts of last resort in many other states, construing the word "claim" as used in statutes analogous to our section 311 have held that the term was broad and comprehensive enough to include demands of every kind and character including those arising in torts as well as those *ex contractu*. *Barrett* v. *City of Mobile*, 30 So. 36, 38; *Hentx* v. *Uinta County Comrs.*, 70 Pac. 840, 842; *Northwestern & Pacific Hypotheek Band* v. *State*, 50 Pac. 586, 587, 42 L. R. A. 33; *City of Cincinnati* v. *Hafer*, 30 N. E. 197, 198; *Pulitzer* v. *City of New York*, 62 N. Y. Supp. 587, 588.

COOK, J., delivered the opinion of the court.

This suit was begun in the circuit court by appellant against the board of supervisors of Lamar county. The declaration avers that the road contractor, acting under the orders of the board of supervisors, departed from the well-defined limits of the public road, and appropriated a part of the lands of appellant, and destroyed the shade trees growing on appellant's land. The declaration seeks to recover the value of the land so appropriated, together with damages for the destruction of the shade trees. The board of supervisors, appellee here, demurred to the declaration, the trial court sustained the demurrer, and plaintiff appeals.

One of the grounds of demurrer is as follows:

"Said declaration fails to aver or allege that the claim upon which the cause of action is founded was ever presented to the board of supervisors as required by statute, to wit, section 311, Code of 1906, and by said board rejected."

The question for decision is: Was the cause of action a claim which the statute requires shall be presented for allowance before a suit can be maintained for its recovery? We think section 311, Code of 1906, requires all claims against the county, whether based upon torts or contracts, whether the damages claimed are liquidated or unliquidated, must be first presented to the board of supervisors before the claimant can appeal to the courts. The county must have official notice of the claim, and a chance to adjust same was evidently the legislative intent as expressed in the statute.

There is some conflict in the decisions of the courts of other states construing similar statutes. No decision of the question here presented has been rendered by this court. In *Barrett* v. *City of Mobile,* 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54, interpreting a statute similar to our own, it is said:

"The legislative intention was to protect the city from expenses of unnecessary litigation by affording it opportunity to settle and discharge its liabilities without suit. The same necessity exists for such protection in respect to torts as in other claims."

Affirmed.

COHN *et al.* v. McCLINTOCK.

[66 South. 217.]

EXECUTORS AND ADMINISTRATORS. *Trust necessity of presentation of claims. Trust for payment of debts. Provision of will.*

A will providing: First, "My will is that all my just debts and funeral expenses by my executors hereinafter named, to be paid out of my estate as soon after my death as shall by them be found convenient," and second, "After payment of my debts by my executors, who are also trustees herein, a one-sixth interest each of my said estate shall be paid over to my said children

from the cash on hand, and as soon as the sale of any property is consummated," did not create an express trust for the payment of debts, rendering it unnecessary for a creditor to have his debts probated and registered within one year after the first publication of notice to creditors as required by Code 1906, section 2107. Since the first clause meant only to direct his executors to pay his debts, which they were required to do by law, the second clause merely directed the payment of debts in preference to the distribution of the estate and this too, was the duty of the executors under the law.

APPEAL from the circuit court of Washington county.

HON. MONROE McCLURG, Judge.

Action by J. W. McClintock, against Jake Cohn and others, executors of the estate of M. Cohn. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Campbell & Cashin, for appellant.

It appears, that the sole question for the determination of this court is whether the will of M. Cohn, deceased, created an express trust for the payment of his debts, so as to render inoperative the provisions of sections 2105, 2106 and 2107 of this Code of 1906, in reference to the registration and probation of claims against the estate of a decedent.

As we understand the rule in this country, and the law as declared by this court, no express trust will be implied, and such a trust must be created, if at all, by plain, clear, precise and unambiguous language. "A general provision for the payment of debts is not sufficient to raise such a trust, but the will must clearly show that such was the intention of the testator." 8 Am. & Eng. Ency. Law, page 1083, note 5 and authorities there cited. "Nor will the direction that certain property be sold for payment of the debts be sufficient to create such a trust." *Carrington* v. *Manning,* 13 Ala. 611, 8 Am. & Eng. Ency. of Law, page 1083.

As stated by COLLIER, C. J., in *Carrington* v. *Manning,* 13 Ala. 611: "Would it not be unjust to raise a trust which would render inoperative the statutes of nonclaim and limitations, from the mere fact that the will made the land primarily liable for the payment of testator's debts, when he never could have contemplated such a consequence?"

Certainly, it cannot be said to be clear from the language of the will that it was the purpose of the testator to create an express trust for the payment of his debts, so as to require the executors to pay the same, whether they should be probated and registered against the estate or not, and so as to render inoperative the provisions of section 2107 of the Code of 1906.

It is true that section 2103 of the Code of 1906, provides that the directions contained in any last will and statement, if not unlawful, shall be followed by the executors; but, so far as we have been able to ascertain there is no authority holding that the mere expression by the testator in his will of a desire that his debts shall be paid, creates an express trust for the payment of his debts, so as to render inoperative the statutes requiring the probation and registration of claims against decedents.

The learned circuit judge who rendered the judgment appealed from in this case, seemed to think that *Gordon* v. *McDougall,* 84 Miss. 715, was an authority which required him to hold that the language of the will of M. Cohn, deceased, created an express trust for the payment of the testator's debts. We are unable to agree with this conclusion of the learned judge below. Taking all of the provisions of the will in that case, eight in number, into consideration, the court simply held that the language of the will clearly manifested a proud spirited purpose on the part of the testator to have his debts paid, at all events, not in the manner and within the time required by law, but that the will by creating annuities, forbidding his wife as executrix to claim any commissions

or allowance, and directing that the estate be kept together, and managed and controlled by the executors, and authorizing them to sell, in their discretion any property that they might see fit, for the payment of the debts, and to use the income and profits arising from the estate in the payment of the debts, clearly evinced a purpose on the part of the testator to create an express trust for the payment of his debts.

The provisions of the will in that case are entirely different from the provisions under consideration now in the case at bar, and granting that the language of the will in *Gordon* v. *McDougall,* clearly manifests an intention on the part of the testator to create an express trust for the payment of his debts, still, we respectfully submit that no such purpose and intention can be fairly inferred from the language of M. Cohn's will, and it certainly cannot be said that such a purpose, as gathered from the said language is clear, precise and unambiguous. It does nothing more than direct that his debts be paid, and as the law requires this to be done anyway, regardless of the testator's wishes, it is held that such phrases are meaningless.

If the provisions in the will under consideration in *Gwin* v. *Nettles,* 18 So. 798, do not create an express trust for the payment of the testator's debts, clearly it cannot be held that the language in this will manifests an intention and purpose on the part of the said testator to create an express trust and a charge upon his property for the payment of his debts. As sustaining our position in this case, we respectfully refer the court to the following authorities: 8 Am. & Eng. Ency. of Law, 1083; 2 Perry on Trusts, sec. 559; *Abby* v. *Hill,* 64 Miss. 340; *Gwin* v. *Nettles,* 18 So. 798; *Steel* v. *Steeke,* 64 Ala. 459, s. c. 38 Am. Rep. 15; *Cudahy Packing Co.* v. *Miller's Estate,* 60 So. 574 (the opinion in this being delivered by this court on January 27, 1913).

We respectfully submit that the judgment below should be reversed and a judgment rendered in this court for the appellants.

W. S. Knotts, for appellee.

I respectfully submit that the will of M. Cohn creates an express trust for the payment of his debts, that the decision of the learned circuit judge was correct and should be affirmed by this court. To sustain the position of the appellee in this case, the court is respectfully referred to the following authorities: *Clark* v. *Hornthal,* 47 Miss. 434; *Abbey* v. *Hill,* 64 Miss. 340, 1 So. 484; *Gordon* v. *McDougal,* 84 Miss. 815, 37 So. 298; *Morse* v. *Hackensack Savings Bank* (N. J. Err. & App.), 20 Atl. 961, 12 L. R. A. 62; Story's Equity Jurisprudence, sec. 980; 49 Cent. Dig., Title "Wills," sec. 1579.

COOK, J., delivered the opinion of the court.

This case was submitted to the circuit judge, a jury being waived, upon an agreed statement of facts, substantially as follows:

(1) That M. Cohn, of Belzoni, Washington county, Mississippi, died on the 3d of December, 1910, leaving a last will and testament, a copy of which is made a part of said agreed statement of facts, and that, at the time of his death, he was indebted to the appellee in this case in the sum of one hundred and twenty-two dollars and eighteen cents, for insurance premiums.

(2) That the appellants duly qualified as executors of the last will and testament of said M. Cohn, deceased, and letters testamentary were issued to them by the chancery court of Washington county, Mississippi.

(3) That thereafter said executors made publication for creditors in accordance with the provisions of section 2103 of the Code of 1906, to register and probate their claims against said estate within one year, notifying them that a failure to so register and probate said claims

would bar them; that more than one year had elapsed since the first publication of the said notice; that proof of said publication was duly filed; and that the claim of the appellee was never probated, and that more than one year has expired since the first and since the last publication of the said notice to creditors.

(4) The defendants deny any liability on the account sued on, because of the failure to probate and register the same within one year, as required by section 2107 of the Code of 1906.

The appellee claims that it was unnecessary to probate and register the claim, as, he contends, the last will and testament of M. Cohn, deceased, created an express trust for the payment of his debts, and therefore it was unnecessary to probate and register the claim as required by said section 2107 of the Code of 1906.

Suit was brought by the appellee on said claim before a justice of the peace, who rendered judgment in favor of the appellants, from which judgment the appellee prosecuted an appeal to the circuit court, in which court, as stated, the said cause was submitted to the circuit judge, a jury being waived, upon the foregoing statement of facts, and the said circuit judge held that the will of M. Cohn, deceased, created an express trust for the payment of his debts, and that therefore the appellants were liable to the appellee for the payment of this debt, and said judge rendered a judgment against them accordingly, from which judgment this appeal is prosecuted.

Omitting the formal parts, the will in question reads this way:

"As to my worldly estate, and all of the property real, personal or mixed, of which I shall die seised and possessed, or to which I shall be entitled at the time of my death, I devise, bequeath and dispose thereof in the manner following, to wit:

"1. My will is that all my just debts and funeral expenses, by my executors hereinafter named, to be paid

out of my estate as soon after my decease as shall by them be found to be convenient.

"2. I give, devise and bequeath to my four children, Abe Cohn, Jake Cohn, Mrs. Freda Davidow and Mrs. Pauline Castleman, share and share alike, a policy of life insurance in the order of Knights of Honor amounting to two thousand dollars, and a policy of life insurance in the order of Knights of Pythias amounting to three thousand dollars."

"4. I give, devise and bequeath to my beloved wife, Hannah Cohn, so long as she shall remain unmarried, all of lot number twenty-one (21) of M. Cohn's subdivision of lots 129, 130 and 134 of the Briley addition to the town of Belzoni, Mississippi, according to map, or plat, of said M. Cohn's subdivision in May Book Number 2, on page 9, in the office of the chancery clerk of said county, said property fronting one hundred and sixty-four feet on Church street, and running west towards Hayden street a distance of two hundred and forty feet, being the property on which is now situated our residence; said gift to my said wife is not made to her in fee simple, but for so long as she shall remain unmarried; upon her marriage, and upon her death before marriage, said legacy shall cease and determine as to her, and same shall vest in my granddaughter, Esther Davidow, if she be then living; and if she be then not living, said legacy shall vest in my granddaughter, Henrietta Davidow, and Sylvia Davidow as tenants in common, if they both be then living, and if either of them be not then living, then to the survivor of them; and if both of them be not living, then said legacy shall vest in the brothers and sisters of them as tenants in common. I also give, devise and bequeath to my said wife, Hannah Cohn, all of my household and kitchen furniture, and said gift of household and kitchen furniture to my said wife is made to her in fee simple.

"5. I give, devise and bequeath to my said wife, Hannah Cohn, and her children by me, share and share alike,

all of the stocks, bonds and other securities, and all of the personal property not otherwise disposed of, of which I may die seised and possessed.

"6. I give, devise and bequeath to my sons, Jake Cohn and Abe Cohn, and to their successor or successors in office, as hereinafter provided, all the rest and residue of my property, real, personal and mixed, *in trust, nevertheless* to be managed, controlled, sold and disposed of as follows:

"A. If the 'Fisk' or 'Belzoni' plantation in Washington county, Mississipi, adjoining the town of Belzoni, and now owned by Morris Levy and myself as tenants in common, shall not have been partitioned at the time of my death then it is my will that said trustees cause said property to be partitioned as soon after my death as it is practicable to do so; and the same shall be kept together for ten years, and planted, farmed, leased or rented as said trustees may deem most advantageous, *except* such portion thereof as may be laid off into town lots, and such other parts thereof as may be sold by said trustees as hereinafter provided.

"B. Said trustees are authorized and empowered to dedicate from time to time, as they may thing advisable, from the land comprising said 'Fisk' or 'Belzoni' plantation, various additions to said town of Belzoni, and cause to be prepared the necessary maps and plats thereof, and they shall sell said lots from time to time, for cash or on credit; and they are further authorized and empowered to sell from said plantation small tracts of land for cash or on credit, where such sales are in their opinion advantageous and for the best interest of my said estate.

"C. Said trustees are also authorized and empowered to sell any and all real estate owned by me at the time of my death (not hereinbefore devised) for cash or on credit, and the same shall be held in trust and paid over to my children and my wife as hereinafter directed. The

property to be sold not to include the 'Fisk' or 'Belzoni' plantation as provided in item A above.

"D. Full power and authority is hereby vested in said trustees to execute any and all deeds of conveyance to my real property sold by them, and any other instruments that may be necessary in the manageemnt and control of my said estate, and all the property, real and personal, sold by them as trustees as aforesaid, shall be released and discharged from any express or implied charge against the same by my children and wife, and the purchasers thereof shall take a good and perfect title to the property sold by said trustees; and no purchaser shall be bound to see to the application of the purchase money, or other consideration paid therefor.

"E. I give, and bequeath from said trust estate *one-sixth* each to my five children, Abe Cohn, Jake Cohn, Freda Davidow, Mrs. Pauline Castleman and Maurice Cohn, and my said wife Hannah Cohn.

"F. After the payment of my debts by my executors, who are also trustees herein, a *one-sixth* interest, each in my said estate shall be paid over to my children and my said wife from the cash then on hand and as soon as the sale of any property is consummated.

"G. At the end of said ten years, said 'Fisk' or 'Belzoni' plantation then remaining shall be divided between my said children and my said wife in the proportion of *one-sixth,* each to my said children and my said wife.

"7. I appoint my sons, Abe Cohn, and Jake Cohn, trustees herein, executors of this my last will and testament, and request that the court will require no bond of them as such; and should either of them die before the completion of the trust reposed in them, then I request that the survivor of them then be appointed executor herein; and should he die before the completion of this trust, then I request that the court appoint an executor to carry out the provisions of this will and trust."

It will be noted that the only reference made by the testator in his will to the payment of debts is contained in two clauses, which are as follows:

(1) "My will is that all my just debts and funeral expenses by my executors hereinatfer named, to be paid out of my estate as soon after my death as shall by them be found convenient."

(2) "After payment of my debts by my executors, who are also trustees herein, a one-sixth interest each of my said estate shall be paid over to my said children from the cash on hand, and as soon as the sale of any property is consummated."

The first clause is the usual stock phrase employed by writers of wills, and it cannot be contended that the testator meant anything more than to direct his executors to pay his debts, and this is what they were required to do by the law. The second clause merely directs the payment of debts in preference to the distribution of the estate, and this, too, was the duty of the executors under the law.

The case mainly relied on by appellees to uphold the judgment of the court is *Gordon* v. *McDougall,* 84 Miss. 715, 37 So. 298, 5 L. R. A. (N. S.) 355. The will in that case is quite different from the will in this case, and the court was of the opinion that the will in that case, taken as a whole, evinced a purpose on the part of the testator to create an express trust for the payment of debts.

This will seems to be practically the same as the will construed in *Cudahy Packing Co.* v. *Miller,* 60 So. 574. The language employed by this court in the above case is peculiarly applicable to this case. There is no substantial difference in the will in the Cudahy case and the will in the instant case.

Reversed and dismissed.

BOARD OF SUPERVISORS OF LAMAR COUNTY v. ELLIOTT.

[66 South. 203.]

1. EASEMENTS. *Ways of necessity. Fixing ways. Bona fide purchaser of servient estate. Rights of.*

A way of necessity over the land of the grantor arises when one sells to another a tract of land, surrounded by other lands owned by him. In such case the way is implied from the grant made.

2. EASEMENTS. *Ways of necessity. Fixing ways.*

Where a grantor grants lands wholly surrounded by his other lands, he has the right when necessity therefor arises, to fix the line of the way of necessity over his land. But if he fails to exercise the right then the grantee can locate the way over his land.

3. EASEMENT. *Bona fide purchaser of servient estate. Rights of.*

Where a defendant knew that his grantor had sold land, wholly surrounded by his other land, to be used for a school, and that well established ways were used by the teacher and pupils over the surrounding land, the defendant on purchasing such surrounding land, takes it subject to the easement.

4. EASEMENT. *Ways of necessity. Right to.*

Where land wholly surrounded by other land belonging to the grantor, is sold and conveyed for use as a school, the fact that the grantee is a municipality or a subdivision of the state, which has the right of eminent domain, does not prevent the grant from carrying with it an easement of a right of way by which teachers and pupils can reach the school.

APPEAL from the chancery court of Lamar county.

HON. R. E. SHEEHY, Chancellor.

Bill by board of supervisors of Lamar county and others against C. C. Elliott. From a decree for defendant, complainant appeals.

The facts are fully stated in the opinion of the court.

Geo. H. Ethridge, for appellant.

It is the contention of the appellees that no right of way was implied by the grant and if the county secured a

right of way, it would have to do so by condemnation proceedings or eminent domain proceedings and would have to pay for the rights so established. It is further the contention of the appellants that no bond for an injunction was required for the county to obtain the injunction under the provisions of section 613, of the Code, and that the county is not liable for damages for the wrongful suing out of an injunction in case its contentions are not well founded; that the county is a portion of the sovereignty of the state; that it is an agency of the state and to impose any penalty, there must be an express statutory provision.

The section of the Code above referred to gives the county a right of injunction without bond. The very purpose of requiring bond is to have a foundation for damages, and where no bond is required, there can be no damages. The chancellor was without authority to put this stipulation in his *fiat;* its being placed there amounted to nothing and was a mere nullity. The bond being without legal requirement is purely voluntary, and neither the county, the trustees or the sureties on the bond are liable to any daamges for the failure of the suit.

In the cases on the first proposition, that a right of way is implied from the grantee, cited in the original brief, that contention is sustained. In addition, however, to the authorities cited, there are other authorities that strengthen the position holding that where an owner of propery establishes a way or other convenience for the benefit of one portion of his land over another portion, and afterwards sells the portion for which the said way is established as a convenience, that the sale of such portion carries the way with it as an incident or an appurtenance of the conveyance and that neither he, nor his grantees, can thereafter obstruct such way or other means of benefit even though such way might not be absolutely necessary for the proper use and enjoyment of the lands

so conveyed; that ways which are visible and permanently established on one part of an estate for the benefit of another part will, upon severance of the estate, pass as an implied or constructive easement appurtenent to the part of the estate for which the benefit was established. *Cikah* v. *Kleke,* 117 Ill. 643; 7 N. E. 111; *Robinson* v. *Thrailkill,* 110 Ind. 117; 10 N. E. 647; *Thompson* v. *Miner,* 30 Iowa, 368; *Huttemeyer* v. *Alboro,* 18 N. Y. 48; *Baker* v. *Rice,* 47 N. E. 653; *Manteck* v. *Jones,* 190 Penn. State, 171, 42 Atl. 536; *Phillips* v. *Phillips,* 48 Pa. State, 178, 85 Am. Dec. 577; *McCarty* v. *Kelechemen,* 47 Pa. State, 239, 87 Am. Dec. 538.

T. W. Davis and *Tally & Mayson,* for appellee.

The learned counsel in the institution of this suit proceeded upon the theory that because the schoolhouse tract was entirely surrounded, at the time of the purchase, by other lands of the grantor, that a way or ways by implication of necessity inured to the grantee, in certain instances that might be true where both grantor and grantee are individuals, but we insist that no public corporation has any right to claim necessity to reach its land when surrounded by other land. These public authorities have the right of eminent domain and could condemn or purchase a suitable way or ways to reach the property. This court expressly held in the case of *Como* v. *Pointer,* 87 Miss. 712, 40 So. 260, that the private rights of individuals to demand ways of necessity over the land of other individuals, even if such right exists, confers no right on a municipality to claim such a way as a public street. The school trustees, when they purchased this land should have stipulated for and obtained proper roads and ways. They are at best mere licensees, and any owner had the right to revoke the license; this was done by the appellee herein. To apply any other rule would be directly in contravention of section 17 of the Constitution providing that private property shall not

be taken or damaged for public use without compensation being first made to the owner. *Vicksburg* v. *Herman,* 72 Miss. 211. The case of *Beck* v. *L. N. O. & T. R. R. Co.,* 3 So. 252, supports the contention herein advanced.

The illustration in appellant's brief of a municipality purchasing the upper story of a building for the purpose of conducting a school, but not providing for stairway rights, is inapt. The municipality is not bound to purchase the upper story of a building for the purpose of conducting a school, and if it does, it should see that such accessories as stairways and other conveniences were provided for at the time of the purchase; but certainly if it was so indiscrete as to not provide for contingencies of that kind, we do not think the landowner should be compelled, without compensation, to give it the right. Learned counsel for appellant, through their brief, cite numbers of authorities supposedly supporting the contention advanced by them. On investigating those authorities we think that none of them are really pertinent to the matter in controversy.

REED, J., delivered the opinion of the court.

In September, 1904, the school commissioners of Lamar county located a public school at a point about the center of a tract of land containing one hundred and sixty acres. Afterwards, by deed dated January 19, 1906, duly executed and filed for record, Mr. White conveyed to the trustees of the school the lot of land, being one acre, upon which the school was located. Three roads, leading to the school, over the tract owned by Mr. White, were with his knowledge and concurrence opened, and have been constantly used since by the children, teachers, and patrons in going to and from the schoolhouse. The school has been maintained and the roads have been used since September, 1904, the time of the location. The school was at first known as "Little Black School." In July, 1912, it was consolidated with "Young's Public

School," and then designated "Pleasant Hill Consolidated Public School;' the larger or consolidated school becoming the successor of the original school, and occupying the same site.

J. J. White, after conveying the lot of land to the school trustees, sold the balance of the tract to R. T. Lawler, who in turn conveyed it to C. C. Elliott, appellee. About the time of the opening of the school in October, 1912, appellee obstructed the roads leading over his land to the school, by placing therein logs, stumps, and debris, so that it was impossible for the patrons, teachers, and pupils to travel over them and reach the school. He also posted notices warning the public not to trespass or enter on his lands or travel over the roads. The supervisors of the county thereupon filed their bill in chancery, and an injunction was granted requiring the appellee to remove the obstructions placed in the roads, and commanding him to desist from interfering in any manner with the opening, conducting, and maintaining the public school.

Upon a final hearing of the cause on bill, answer, and testimony, the chancellor entered a decree dismissing the bill, dissolving the injunction, and giving judgment in favor of appellee against appellants and the sureties on the injunction bond for two hundred and fifty dollars, fixed as a reasonable solicitor's fee. From this decree of the chancellor, appellants have prosecuted this appeal. In the final decree the chancellor states his reason for his decision in the following words:

"The court finds that complainants have no easement or right of way to said school lot by virtue of the conveyance from J. J. White to the schoolhouse tract."

It is contended by appellants that, when the land was conveyed to the trustees by Mr. White, the then owner, an easement of right of way leading over his land to the schoolhouse site was implied, because the site conveyed was wholly surrounded by the grantor's land, and that

such way was necessary to reach the purchased land. It is beyond question that a way of necessity over the land of the grantor arises when one sells to another a tract of land surrounded by other lands owned by him. Without such way the property granted could not be used for the purpose intended. In such cases the way is implied from the grant made. It is a necessary incident thereto. *Bonelli Brothers* v. *Blakemore,* 66 Miss. 136, 5 So. 228, 14 Am. St. Rep. 550; 3 Kent's Commentaries, 420; 2 Blackstone's Commentaries, 35. When Mr. White conveyed to the school trustees the lot in the center of his one hundred and sixty acre tract, to be used as a school site, there accompanied the grant, as a necessary incident thereto, an implied grant of right of way across the remaining land of the tract to the school property. This easement arose by necessity, for without it the grant would be useless.

Now, it appears that the ways over and across the land and used in going to and from the school were established with the knowledge, permission, and consent of Mr. White, the then owner. It was the right of the owner, when necessity therefor arose, to fix the line of the way of necessity over his land. If he failed to exercise this right, then the school trustees could have located the way. When once defined, and use thereof made with the knowledge and permission of both parties, then both should be bound by the line so fixed. *Powers* v. *Harlow,* 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154. It appears, however, in this case, that the location as well as the use of the way was with the knowledge and permission of both the grantor and the grantees.

Appellee had full knowledge of the location and use of the roads when he purchased the land. In his testimony he says that he had been living in a mile of the schoolhouse since it was established; that he knew a free school was maintained there; knew of the location of the roads, and that the people were using them in going to

and from the schoolhouse. Appellee acquired and took the land subject to the easement of the way of necessity. Such way was recognized and approved by and established with the consent of the owner, and was also necessary to the use of the school property. *Bonelli Brothers* v. *Blakemore,* 66 Miss. 136, 5 So. 228, 14 Am. St. Rep. 550; *Manbeck* v. *Jones,* 190 Pa. 171, 42 Atl. 536. Appellee was not justified in obstructing and closing the roads. A court of equity has jurisdiction to forbid his obstruction thereof, restrain his interference therewith, and compel the keeping the way open.

Appellee contends, and it appears from the argument of his counsel to be the sole contention in support of the chancellor's decision, that no easement of right of way attended the conveyance to the trustees, that the rule which applies to private owners relative to ways of necessity does not apply to a municipality or a subdivision of the state, and that public authorities having a right of eminent domain should condemn or purchase suitable ways of reaching property in cases like the one now before us. He relies upon the case of *Town of Como* v. *Pointer,* 87 Miss. 712, 40 So. 260. In that case the judge delivering the opinion of the court said that:

"The private right of individuals to demand a way of necessity over lands of other individuals, even if such right exists, confers no right on a municipality to claim such way as a public street."

The facts in the two cases are very different. The statement of the judge in delivering the opinion in *Como* v. *Pointer* will not be applicable to the present case. There is no effort here on the part of the county to secure a public road. The effort in this case is to preserve for the use of the school patrons, teachers, and pupils the private roadways which have become easements as way of necessity. The law touching the subject of such easements is as applicable to a case like the present, where school trustees have purchased a lot surrounded

by other land of the grantor, as to a case where an individual has made such purchase.

The chancellor erred in deciding that the trustees had no easement of right of way to the schoolhouse by virtue of the conveyance from J. J. White.

Reversed and remanded.

MOBILE AUTO CO., *et al.* *v.* R. W. STURGES.

[66 South. 205.]

1. SALES. *Remedies of buyer. Breach of warranty. Parties liable. Defenses.*

Where a purchaser bought an automobile from a nonresident, which was shipped consigned to the seller, and a bill of lading with draft on the purchaser for the purchase price was assigned to a bank, the purchaser was thereby compelled to pay the purchase price before getting possession of the car, and the fact that he did so, does not preclude him from thereafter bringing suit to recover for a breach of warranty.

2. SALES. *Remedies of buyer. Breach of warranty.*

Where a purchaser of a car is not required to pay the purchase price before delivery, he may in case of breach of warranty, either reject the car and enter suit for damages, for breach of contract, or pay the price, take the car and recover the difference between its value in the condition received and the value of the car required by the contract.

3. SALES. *Warranties. Construction. Parties liable.*

Where a bank at different times took assignments of drafts with bills of lading attached for two different automobiles, sold to the same buyer by the same seller, the bank was a co-warrantor in both transactions and the amount received by it upon the second draft could be attached by the purchaser in an action to recover for breach of warranty in the sale of the first car.

4. SALES. *Remedies of buyer. Breach of warranty. Defenses.*

Where the buyer of an automobile, sold it after notifying the original seller of a breach of warranty, and took in part pay-

ment another car, this did not preclude his right to recover for the breach of warranty since the value of the car taken in payment could be determined, and the amount received by the original buyer for the defective car thereby ascertained.

APPEAL from the chancery court of Lauderdale county.
HON. SAM WHITMAN, Chancellor.

Suit by W. R. Sturges and Company against the Mobile Auto Company and others. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

McBeath & Miller, for appellant.

A. S. Bozeman, for appellee.

REED, J., delivered the opinion of the court.

On May 29, 1911, R. W. Sturges & Company purchased an automobile from the Mobile Auto Company. A sight draft was drawn for the purchase price, one thousand, two hundred and fifty-six dollars, with bill of lading attached. The car was shipped to Meridian, consigned to the Auto Company, with instructions to notify Sturges & Company. The draft and bill of lading were assigned to the Bank of Mobile. Sturges & Company paid the draft, obtained the bill of lading, and received the automobile. Immediately upon its inspection they wrote the Auto Company that they were disappointed with the car, and that it appeared to have been used a great deal. In their letter they called attention to several defects in the car, and suggested that they could not sell it as a new car, but could keep it for demonstrating purposes, and that a reduction should be made to them on the price. Several letters passed, without any definite understanding being reached. On June 30, 1911, the Mobile Auto Company sold Sturges & Company another automobile, and made draft with bill of lading attached for the purchase price. As in the other sale, the draft and bill of

lading were assigned to the Bank of Mobile. This draft was collected by the First National Bank at Meridian.

Thereupon Sturges & Company, appellees, filed their bill in chancery to attach the money then in the hands of the First National Bank as the property of the Mobile Auto Company and the Bank of Mobile, appellants, both non-resident corporations, domiciled in Mobile, Alabama; the purpose of the suit being to recover damages for breach of contract in the sale of the first automobile. Upon a final hearing the chancellor gave judgment in favor of appellees and against appellants for one hun-forty-three dollars and fifty cents, which was ascertained to be the loss sustained.

Appellants contend that the receipt and examination of the automobile by appellees constituted an acceptance by them, and that they could not thereafter rescind their contract or sue for breach of warranty. This is answered by the notice, contained in appellees' letter under date of May 31st, of the defective condition of the automobile, and their inability to use it as a new car. The receipt of the automobile, under the circumstances shown in this case, did not amount to an acceptance thereof by appellees, so that they were precluded from recovering the loss they sustained by reason of the car not being in the condition required by the contract of sale.

If the sale had not required the payment of the purchase price before delivery, appellees, as buyers, could have (1) rejected the car and entered suit for damages for breach of the contract, or (2) paid the price, taken the car, and recovered the difference between its value in the condition received and the value of the car requird by the contract. *Commission Co.* v. *Crook*, 87 Miss. 445, 40 So. 20, 1006. Appellees, of necessity, were required to pay the purchase price before they could get possession of the car. Having paid the price, and having the car in possession, they then proceeded, by this suit, to recover the difference between the value of the

car when it was received at Meridian by them, and the value of a like car new and in good order, such as was sold to them. It appears that this difference was ascertained by deducting the amount received by appellees, when they sold the car, from the original purchase price paid by them.

Appellants claim that the proceeds of the draft for the second automobile in the possession of the bank at Meridian could not be subjected to the payment of damages from the failure of warranty in the sale of the first automobile. Appellants' counsel argue that the purchase by the bank of the draft and bill of lading rendered it liable as a co-warrantor to the extent only of having the proceeds of the second draft subjected to the settlement of any claim arising out of the salf of the second automobile. The proof shows that the Bank of Mobile was the assignee and holder of the drafts and bills of lading in both sales. The bank was a co-warrantor in both transactions. Having in each transaction purchased the draft and bill of lading, the bank was under obligations to fulfill the terms of the contract in both sales, between seller and buyer. Through assignment it was placed, in both instances, in the same situation occupied by its assignor relative to the compliance with the original contract of sale.

This is a suit to recover from the bank, as well as the Auto Company, the original seller. The proceeding by attachment was to obtain jurisdiction over the personal property of nonresident defendants, and thereby require the appearance of the bank to defend the cause in the Mississippi courts. Appellees had a cause of action against the bank. It was proper to subject the funds to the possession of the bank at Meridian for the settlement of the loss which they sustained in this case. *Miller* v. *Bank,* 76 Miss. 84, 23 So. 439; *Searles Bros.* v. *Grain Co.,* 80 Miss. 688, 32 So. 287; *Bank* v. *Searles,* 81 Miss. 172, 32 So. 314.

We see no force in the contention by appellants that appellees were not entitled to recover because they, in disposing of the automobile in question, received in part settlement another automobile. In the disposition of the case, and in order to arrive at the true amount of the loss sustained by appellees, it was only necessary for the chancellor to determine from the proof the value of the car when it was received by appellees at Meridian. There is sufficient evidence to support his finding as to this.

Affirmed.

PEOPLES BANK v. LAMAR COUNTY BANK.

[66 South. 219—67 South. 967.]

BANK AND BANKING. *Ownership of stock. Transfer. Conversion.*

Under Code 1906, section 5005, providing that no corporation shall purchase or own the capital stock, or any part thereof, of any other corporation, if such other corporation be engaged in the same kind of business and be a competitor therein, and that any corporation offending against this provision shall forfeit its charter if a domestic corporation, and if a foreign corporation shall forfeit its right to do business in the state, a bank is prohibited from accepting a transfer of stock in another bank, with which it was in competition, in payment of the indebtedness of a customer; and such transfer being illegal, the transferee, could not recover against the bank whose stock was so transferred for conversion thereof in refusing to transfer the same on its books to the transferee bank.

ON SUGGESTION OF ERROR.

1. BANK AND BANKING. *Ownership of stock in other banks. Transfer. Validity.*

Under Code 1906, section 5005, prohibiting the acquisition of stock by one of two competing corporations in the other, is a mere *ultra vires* act and of which the state only could complain.

2. BANK AND BANKING. *Transfer of stock. Bona fide purchaser without notice.*

A corporation by issuing a second certificate of stock without surrender and cancellation of the first, becomes liable to any subsequent purchaser for value of the first, who was without notice of the issuance of the second.

3. CORPORATION. *Transfer of stock. Bona fide purchaser without notice.*

A corporation accepting corporate stock in payment of a debt due it to the extent of the value of the stock is a purchaser for value to the same extent as if it had paid money.

APPEAL from the circuit court of Jefferson Davis county.

HON. A. E. WEATHERSBY, Judge.

Suit by the Lamar County Bank, against the Peoples Bank. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

D. A. McIntosh, for appellant.

In giving us notice that we might file a brief in this matter, the court has suggested that we discuss what hearing, if any, the case of *Watts Mercantile Company* v. *Buchanan,* 92 Miss. 540, 46 So. 66, has upon the case at bar. In the instant case, the court is dealing with a transaction between two competing corporations; in the Buchanan case, the court was dealing with a transaction between an individual, and a corporation. In the instant case, the appellant here, is setting up not only the *ultra vires,* but the illegal act of the appellee, the moving party, as a bar to its right of recovery, whereas, in the Buchanan case, the appellant was setting up its own *ultra vires* act, and its own illegal acts against Buchanan's right to recover for the value of the stock which he formerly owned in the Elberta Hoop Company.

In the Buchanan case the appellee had parted with something of value on the promise of the appellant to pay therefor, and appellant not only held on to the pro-

perty, but invoked the doctrine of the *ultra vires* against its own obligation to pay. In the instant case, the appellee, Lamar County Bank, parted with nothing of value to Vance R. McDonald, because the proof shows that McDonald was absolutely insolvent, and they knew it when they acquired this certificate of stock from him, and they took it for the purpose of applying it on the old debt of Vance R. McDonald to them, at a time when the Bank of Bassfield, which had never received one cent for the stock, had already transferred the same on its books at the request of Vance R. McDonald, to other parties, who had paid McDonald therefor.

At the close of Judge CALHOUN'S able opinion in the case of *Watts Mercantile Company* v. *Buchanan,* he used these words: "We subscribe to that doctrine in the particular case we have in hand," etc. This able Jurist was on the bench, and participated in the case of *Woodson* v. *Hopkins*; evidently he had no purpose in this case to overrule the wise doctrine announced in that opinion, that neither a court of law or Equity in this state will entertain a suit for relief by either of the two parties *in pari delicto* against the other, where the contract is against the public policy. Again, the last clause in the above opinion, "A careful reading of the pleadings of the record, the evidence and the decree in this case, makes it plain that this suit cannot be maintained, except by the use, and through the aid of the illegal contract itself, etc."

It is suggested by the counsel *contra,* in his able brief, that perhaps the Lamar County Bank ought not to have purchased this stock from Vance R. McDonald direct, but that they should have procured it to be assigned to a trustee for their benefit, as security for the debt due to them by Vance R. McDonald. The Lamar County Bank was evidently too wise to take this certificate of stock as a mere security for a preexisting debt, and thus leave their old debt against Vance R. McDonald, unsat-

isfied, and in full force. They knew the financial condition of Vance R. McDonald, and doubtless were advised that if they accepted the stock as security for a preexisting debt, they might run against the old and sound principle announced in *Perkins* v. *Swauk,* 43 Miss. 349, which announces that where property is taken merely as security for a preexisting debt, which remains unsatisfied, and in full force, the party taking it, is not a purchaser for value.

The court's opinion in this case covers precisely our conception of the law of this case, and we deem it useless to argue the same further. There is much wisdom, we think, in the following excerpt from the able opinion of Judge CALHOUN in the case of *Watts Mercantile Co.* v. *Buchanan,* viz: "We subscribe to that doctrine in the particular case which we have in hand," and if the court overrules this suggestion of error, and subscribes to the doctrine, announced in its former able opinion, as the law of the case which it has in hand, we are confident it will be in harmony with Mississippi law and authority.

Tally & Mayson, for appellee.

In response to the request of the court, counsel for appellent have filed a brief discussing to some extent the case of *Watts Mercantile Company* v. *Buchanan,* 93 Miss. 540. Counsel contend that the holding of this court in the Watts Mercantile Company case is inapplicable because the transaction there was between a corporation and a private individual, and that the corporation was setting up its own *ultra vires* act in defense of its obligation to pay for property of which it retained possession.

It is true that the Watts Mercantile Company case is not identical with the case at bar. The facts in that case are not very clearly set out, but it will be noted from a careful reading of Judge HARPER'S brief and the opinion of the court in the case, that the Watts Mercantile Company, a corporation, bought of Buchanan, stock of the

Alberta Hoop Company, a corporation, for which it executed to Buchanan its promissory note. The note was not paid and Buchanan brought suit against the Watts Mercantile Company thereon. The Watts Mercantile Company defended on two grounds; one was that its manager had no authority to purchase the stock of the Alberta Hoop Company, and secondly, that if McDonald had authority from the Watts Mercantile Company to make the purchase, the note was void because, under the Acts of 1900, one corporation could not purchase or own the capital stock of another corporation or purchase or own the franchise plant or equipment of another corporation.

In passing on the case the court held that: "If the transaction was *ultra vires,* it is idle in this case to talk about McDonald not having the power to sign the note for the Watts Mercantile Company." The court then proceeds to examine the question of the effect of the Mercantile Company purchasing stock of the Alberta Hoop Company from Buchanan. Jude CALHOUN said in speaking to this point: "In examining the question as to whether or not this contract was *ultra vires,* it must be borne in mind that Buchanan was a private individual;" so we say in this case, it must be borne in mind that McDonald was a private individual, and had free unlimited power to sell his stock in the Peoples Bank, unaffected by section 5005 of the Code otherwise, so that in this case, as in the Watts Mercantile Company case, there is no question of the power of the seller to sell the stock. It is true that in the Watts Mercantile Company case the *ultra vires* act was set up by the purchasing corporation; in this case it is set up by McDonald's predecessor in title, and in this respect only are the two cases different. The principle involved, however, is the same. In that case the court held that the purchasing corporation could not set up the *ultra vires* act. In *Hinds, etc., County* v. *Railroad,* 85 Miss. 599, the selling corporation

undertook to set up the *ultra vires* act, and it was there held that the selling could not do so. In other words, under the doctrine announced in the Watts Mercantile Company case, and the case in 85 Miss. *supra,* it is definitely settled that the selling company cannot set up the want of power in the purchasing company to defeat the transaction, and that the purchasing company cannot plead an *ultra vires* act, if it retained the fruits of the purchase. It clearly appears from these two cases that if the Peoples Bank had sold this stock direct to the Lamar County Bank, then the Peoples Bank could not be heard to say that the transaction was *ultra vires,* and it would seem clear therefore, that if a direct sale from the Peoples Bank could not be said to be *ultra vires,* it certainly cannot be said that when the stock was sold by McDonald—who had a right and unlimited power to sell—that the act was *ultra vires.* Stated differently, the rule is that no one has a right to complain of a transaction unless he is injured by it, without regard to the lack of power in another to do the act.

In the case at bar the state of Mississippi could perhaps complain of the act. The creditors of the Lamar County Bank could also, if they could show that their interest had been affected by the transaction. Under the same conditions the stockholders of the Lamar County Bank might complain, but the Peoples Bank has no ground of complaint, because it is not injured by the transaction. In considering this question it must always be borne in mind that the Lamar County Bank purchased the stock from one who had a legal right to sell it, as unequivocally held in the Watts Mercantile Company, *supra,* and the only question involved is the power of the Lamar County Bank to buy. It probably had no such power, but it did buy, and for a very good reason. A third party to the transaction, to wit, the Peoples Bank, had no right to complain, and cannot raise the question of power in this proceedings.

We respectfully submit that the case should be affirmed.

REED, J., deivered the opinion of the court.

This is an action of conversion brought by the Lamar County Bank, appellee, against the People's Bank, appellant, to recover the amount of thirty shares of the capital stock in appellant bank, with accrued dividends. This stock was assigned to appellee by Vance R. McDonald in settlement of an indebtedness. He was at the time cashier of appellee bank and largely indebted to it. The evidence shows that the stock was transferred and delivered by him to the bank in part payment of his indebtedness and that he received credit for the face value thereof. Appellant refused, upon request, to enter a transfer of the stock on the books of the corporation. On the hearing of the case the trial court granted a peremptory instruction for the plaintiff, and gave a verdict for the full value of the stock, with dividends and interest. From this action of the court this appeal was taken.

Appellant claims that the purchase of the stock by appellee was an illegal contract under the laws of Mississippi, and that such contract can have no effect or be enforced in any court of this state. This point was also raised in a demurrer, which was filed by appellant to the declaration and overruled by the court. It is contended that appellant and appellee are competing corporations, being engaged in the same kind of business, that of banking, and being competitors therein. The evidence shows that the banks were located in the same general territory, and should be classed as competitors for business therein. By section 5005 of the Code of 1906, competing corporations are prohibited from directly or indirectly purchasing or owning the capital stock or any part thereof of another corporation. We quote that section in full:

"No corporation shall directly or indirectly purchase or own the capital stock, or any part thereof, of any

other corporation, nor directly or indirectly purchase, or in any manner acquire the franchise, plant or equipments of any other corporation, if such other corporation be engaged in the same kind of business and be a competitor therein. Any corporation offending against this provision shall forfeit its charter, if a domestic corporation, and if a foreign corporation, shall forfeit its right to do business in this state, and shall be proceeded against by the attorney-general in manner and form provided in section 5004 of this chapter."

It will be noticed that by the statute the purchasing and owning of capital stock in competing corporations is not only prohibited, but the offending corporation is severely penalized therefor. We note that subsequent to the time of the sale of the stock by McDonald to appellee, which occurred in 1909, the legislature of this state has again, in 1910, dealt with this statute, and has by an act (chapter 223 of the Laws of 1910) amended section 5005 so as to prohibit competing corporations from acquiring in any manner the capital stock, or any part thereof, of another corporation doing business in this state. We mention this law here, not because it is in force in the present case, but only to show that the state legislature has recently approved the statute, and by the amendment preventing the acquiring of the capital stock, extended its effect. The statute expressly prohibits the act of appellee in purchasing the stock. The contract of purchase was in direct violation of the statute. It was therefore illegal. Being illegal, appellee could not through it recover.

We find quite a full discussion of the law applicable to illegal contracts in the case of *Woodson* v. *Hopkins*, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275. In that case the contract was illegal, as being contrary to public policy. In this case it is illegal, because made in breach of a statute. The principles announced in *Woodson* v. *Hopkins* are in the main

applicable to the case now before us. In delivering the opinion of the court, WHITFIELD, C. J., made, with approval, the following quotation from 9 Cyc. 546:

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxim, '*Ex dolo malo non oritur actio,* and in '*In pari delicto potior est conditio defendentis.*' The law, in short, will not aid either party to an illegal agreement; it leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed, in whole or in part, by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, where the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement. While it may not always seem an honorable thing to do, yet a party to an illegal agreement is permitted to set up the illegality as a defense, even though it may be alleging his own turpitude. Money paid under an agreement which is executed, whether as the consideration or in performance of the promise, cannot be recovered back where the parties are *in pari delicto.* And goods delivered or lands conveyed under an illegal agreement are subject to the same rule. Courts will not, even with the consent of the parties, enforce an illegal contract. And it would seem to follow that an illegal agreement cannot be rendered legal by ratification."

In the case of *Franklin Bank* v. *Commercial Bank,* 36 Ohio St. 350, 38 Am. Rep. 594, quoting from the headnote:

"The parties were banking corporations organized under a law forbidding any bank to hold or purchase stock in any other corporation, except to prevent loss upon a debt previously contracted in good faith. The plaintiff loaned money to the defendant's president individually, and took as security a certificate of shares of the capital stock of the defendant belonging to him. Subsequently the plaintiff presented the certificate to the defendant, and demanded a transfer of the shares on the defendant's books. This being refused, the plaintiff sued for conversion of the stock. Held not maintainable."

Mr. Michie, in his treatise on the law of Banks and Banking, discussing the purchasing and holding of stock in another corporation, and stating that, where expressly prohibited from so doing, a bank could not purchase stock in another corporation, and its action in so purchasing could not be validated by estoppel, cited the case of *Franklin Bank* v. *Commercial Bank,* and in a footnote made the following comment:

"Where a bank, which is prohibited by law from taking stock in another corporation as a pledge for a contemporary loan, takes in such manner the stock of another bank, it has no right of action against the latter bank for its refusal to transfer the stock, though the law provides that any bank violating any provision of the act shall forfeit all its rights and franchises, which forfeiture can only be declared in a proceeding by the state." Michie on Banks and Banking, vol. 1, p. 660.

The act of purchasing the stock was clearly prohibited by the statute. There can be no question but that it was the intention of the legislature to prohibit just what has been done in this case. This intention will certainly be gathered from the language and subject-matter of the statute, and the evil, the purchasing and owning by a corporation of capital stock in a competing corporation, which it seeks to prevent. Appellee, the party seek-

ing to recover, was obliged to make out its case by showing the illegal contract. It acquired the right it claimed in the stock through the medium of this illegal transaction. Appellee is therefore not entitled to recover from appellant. *Woodson* v. *Hopkins, supra.*

Reversed and remanded.

OPINION ON SUGGESTION OF ERROR.

SMITH, C. J. The facts of this case necessary to now be stated, in addition to what was said relative thereto in our former opinion, are that the certificate of stock here in question was lost by its former owner, McDonald, and on March 20, 1908, a new certificate was issued to him therefor, which new certificate, or, rather, another issued in lieu thereof, is now owned by J. H. McLeod. In April, 1909, the certificate first issued, the one here in question, was assigned by McDonald to appellee in part payment of an indebtedness due it by him. Whether McDonald had in fact lost this certificate at the time he obtained the issuance of the new certificate does not appear, and is not material.

The ground upon which we reversed the judgment of the court below was that appellee's acquisition of this certificate of stock was in violation of section 5005 of the Code, and therefore it could not invoke the aid of the courts in enforcing any right which it claimed to have thereby acquired. 66 So. 219.

Appellant has now called to our attention, for the first time, the case of *Watts* v. *Buchanan,* 92 Miss. 543, 46 So. 66, in which the acquisition of stock by one of two competing corporations in the other was treated as a mere *ultra vires* act and of which the state only could complain. The construction there put upon the statute is controlling here unless that case is to be overruled, and this we do not think should be done.

Two other reasons are assigned by appellant for reversing the judgment of the court below: First, that,

when it in good faith issued the second certificate of stock, the first ceased to be binding upon it; second, that appellee was not a purchaser for value. It is stated in 4 Thompson on Corporations, sec. 3522, that "stock properly issued is valid and binding until taken up by the corporation and canceled." Whether this be true or not, it is beyond question that by issuing the second certificate without the surrender and cancellation of the first, appellant became liable to any subsequent purchaser for value of the first who was without notice of the issuance of the second (10 Cyc. 634); and, when appellee accepted the stock in payment of the debt due it by McDonald to the extent of its value, it became a purchaser thereof for value to the same extent as if it had paid the money. *Soule* v. *Shotwell,* 52 Miss. 236; *Harris* v. *Lombard,* 60 Miss. 29.

Suggestion of error sustained and judgment of the court below affirmed.

Suggestion of error affirmed.

REED, J. I cannot agree to the affirmance of this case. My reasons for declining to join with the majority of the court in sustaining the suggestion of error and affirming the case are fully stated in our former opinion appearing in 66 So. 219.

It is stated in the present opinion that this case is controlled by the decision in the case of *Watts Mercantile Co.* v. *Buchanan,* 92 Miss. 543, 46 So. 66. I note quite a difference in the two cases. In the Watts case, Buchanan sold his interest in the Alberta Hoop Company to the Watts Mercantile Company. The suit was upon a promissory note given by the vendee to evidence the purchase price. To escape the payment of the note, the company defended on the ground that the transaction was *ultra vires,* because it involved a purchase by one corporation of an interest in another. It seems that the Watts Company had been part owner and stockholder

of the Hoop Company, and when it bought from Buchanan it practically owned the entire company. Judge CALHOON, delivering the opinion of the court, after reciting the facts, said:

"We are thus drawn to consider the bald proposition whether a corporation, which makes" an *ultra vires* . . . "purchase from a private individual who has the power to sell, can set up its own *ultra vires* to defeat payment, and at the same time hold on to the" proceeds of "the contract."

In referring to the statute forbidding the purchase by one corporation of the capital stock of another, and the penalty which is provided that the corporation offending should forfeit its charter and be proceeded against by the attorney-general, the judge continued:

"It might be enough in the case before us to say that the penalty denounced is against the purchasing corporation, and that it would have to be stretched to cover a case as against an individual seller."

The decision of the court was planted particularly on the language of a New York court (*Seymour* v. *Spring Forest Cem. Ass'n,* 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859) which is as follows:

"That kind of plunder which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state."

Judge CALHOON then said:

"We subscribe to that doctrine in the particular case we have on hand."

It will be noted that in the *Watts* v. *Buchanan Case* the court was dealing with the enforceability of an *ultra vires* contract between the parties thereto. The court was applying the rule taken from the language of the New York court to the particular case in hand. The Watts Company, a corporation, was seeking to defeat the collection of its promissory note by setting up its

own *ultra vires* act, and at the same time holding on to the proceeds of the contract.

This case is different. Appellant is not endeavoring to hold on to property acquired by any *ultra vires* act on its part. It is not seeking to defeat payment of any indebtedness it owes. It has not been guilty of any *ultra vires* act. It has received no benefit from such an act.

What appellee complains of is appellant's refusal to transfer on its books stock of its company which was acquired by appellee in clear violation of the statute.

Appellant is not pleading *ultra vires*. Appellant bases its refusal to make the transfer upon the unlawfulness of appellee's purchase. Appellee claims its right to the stock through the medium of an illegal transaction. The contract in this case is illegal because in breach of a statute. I think that this was sufficient ground for appellant's refusal to make the transfer, and I do not believe that this case should be controlled by the decision in the case of *Watts Mercantile Co.* v. *Buchanan.*

McCALL COMPANY *v.* PARSON, MAY, OBERSCHMIDT COMPANY.

[66 South. 274.]

1. EVIDENCE. *Parol evidence to vary written contract. Novation. Substitution of new debtor. Incomplete. Negotiations. Sales. Construction of contract. Return of goods.*

Where plaintiff and defendant entered into a five-year contract for the purchase of patterns by defendant from plaintiff, which provided that two hundred and fifty dollars of the purchase price of patterns ordered at the date of the contract should remain as a standing credit during the term of the contract, and that interest should be paid thereon semiannually, it could not be shown by parol evidence that plaintiff's agent stated that defendant would not be called upon to pay this sum, but that, at the expiration or discontinuance of the contract, patterns might be

returned in settlement thereof, since such evidence was simply an attempt to vary by parol the terms of a plain and unambiguous contract, nor was such evidence admissible as showing that the contract was induced by false representations.

2. NOVATION. *Substitution of new debtor. Incomplete negotiations.*

Where defendant, who had contracted to purchase patterns from plaintiff for five years, discontinued business and thereupon, plaintiff's agent, defendant, and a third party entered into an agreement that defendant should be released from liability on the contract; that its stock of patterns should be turned over to the third party, who, with certain modifications would assume the contract, but this contract was to be submitted to plaintiff for his approval and was approved by plaintiff, and returned for the signature of defendant and the third party, who repudiated it on the ground that it differed from the agreement made by the agent; defendant was not relieved from liability on the original contract thereby, even though the agent was authorized to enter into a contract of that character, since he did not assume in this matter to exercise such authority.

3. SALES. *Construction of contract. Provisions relative to return of goods.*

Under a five-year contract for the purchase of patterns by defendant from plaintiff, providing that patterns reported by plaintiff as discarded might be returned and exchanged for other patterns and should be credited to a discard exchange account, the credit to continue for six months, and all patterns ordered within such period, excepting the monthly standing order, to be charged to such account unless the account was exhausted, where the purchaser on several occasions failed to order a sufficient number of new patterns within the six-months period to exhaust its credit for those returned, it was not entitled to have the balance credited to its regular monthly order or on its indebtedness on account of the initial order for patterns which was to be carried during the term of the contract, since the contract in express terms provided otherwise.

4. MONOPOLIES. *Illegality of contracts of sale. Recovery of purchase price.*

Even though a contract providing that "we will not sell any other patterns than the McCall Patterns received from you during the term of the contract order," violates our anti-trust laws, still the purchaser is not released thereby from the payment of the amount due by it for patterns received.

Appeal from the circuit court of Lincoln county.

Hon. D. M. Miller, Judge.

Suit by the McCall Company against the Parson, May, Oberschmidt Company. From a judgment for plaintiff for insufficient relief, it appeals and the defendant cross-appeals.

The facts are fully stated in the opinion of the court.

M. McCullough, for appellant.

There may be elements of untruth or falseness in a statement by an agent that a written contract meant so and so, but in such statements there may not be any fraud practiced on the opposite party. At least his plea must set up the fraudulent practices with certainty and detail. In every plea where special matter, not set up in the pleading of the opposite party is relied on as a defense the pleader must not be content by alleging this new matter in a general way, or by a general plea, but must sufficiently plead such matter setting it up in detail giving the actual ground of defense. In the case of *Tittle* v. *Bonner,* 53 Miss. 578, *et seq.,* the court after giving pretty fully why a plea of fraud must be set out in particularity as to the acts of fraud, among other things, says: "The true object of pleadings is to apprise the adverse party of what he is called upon to answer, in order that he may be prepared to contest it, and may not be taken by surprise; and any pleadings which fall short of this is bad. A plea averring fraud and misrepresentation, without any indication of the particulars in which it is said to consist, is bad on demurrer." *Herndon* v. *Henderson,* 41 Miss. 584; *Hanks* v. *Neal,* 44 Miss. 212; *Wren* v. *Hoffman,* 41 Miss. 616; *N. O. R. Co.* v. *Wallace,* 50 Miss. 244.

If there had been vagueness or uncertainty or ambiguity in the words and phraseology of the contract, then there is a line of authorities admitting, and I think rightly, oral evidence to show the real meaning intended by the contracting parties. On this line see, *Thayer Export*

Lumber Co. v. *Naylor,* 100 Miss. 841; *Kerl* v. *Smith,* 96 Miss. 827; 4 Wigmore, 2461-2465.

However, the case here presented does not, in my judgment, involve the construction of a contract where the terms are ambiguous, doubtful, or needing of explanation. Every provision of the contract-order is couched in simple plain English, capable of one and only one meaning or construction. The first instruction given the appellee is based on the testimony of the witness Parsons as to these fraudulent inducements. If my argument is sound, then all this testimony should have been excluded.

Another fatal objection to this instruction is that it assumes that Wright was the legal representative of the appellant. This instruction does not state the law correctly. It should instruct the jury as to whether or not they believe from the evidence that Wright was the authorized agent of the appellant. This instruction should include the idea that if they believe false representations were made and relied on by appellee, and that such false representations were believed and relied on as inducement to execution of the contract. The jury is not, in this instruction, told what to believe before they can say any agent of appellant was "empowered to make contracts." In this case there is no proof to show agency or Wright save what appellee's witnesses say Wright said from his own mouth. There must be other circumstances, other than the alleged agent's statements to prove agency.

Referring again to the admission of evidence to vary or explain the contract sued on in this case, I submit that our law directs that all provisions of a contract must be construed together and the purpose determined from the whole of it; and that in this case the purpose of the contract is to make the appellee liable to appellant for the payment of the entire purchase price of the goods delivered. *Spengler* v. *Stiles, Tull Lbr. Co.,* 94 Miss. 780; *Heard* v. *Garritt,* 34 Miss. 152.

A written contract, plainly written and not doubtful and ambiguously stated, must be construed by the court and not by the jury. *Fairly* v. *Fairly*, 38 Miss. 280. In any case where the sources of information are open to all the parties alike in relation to any written contract, then each tub sits on its own bottom, and such a contract, is not voidable and testimony to vary its terms is inadmissible. *Sample* v. *Bridgford*, 72 Miss. 293.

In the second assignment of error I must insist on the reason for the admission of evidence, already given, and the argument already presented to sustain my view that the instruction is bad, in this case, first because there is no proper evidence in the record to support it and, secondly, because the instruction fails to state the law properly to the jury. This instruction assumes that the salesman who succeeded in placing the contract for appellant with the appellee was the legal representative of the appellant. It should say to the jury, if you believe from the evidence that the salesman who placed the order or induced the execution of the contract was the legal representative of the appellant, and so on. This instruction assumes to the jury that whoever the salesman was, he was empowered to make contracts binding on his principal. For the instruction to say "by fraudulently inducing defendant" is not sufficient; but it should add the element of material representations, or the element of trust relation to appellee, or the element of wilfully withholding material information that was not in the possession of the appellee or the idea that appellee was caused by appellant's agent not to have opportunity to investigate the terms of the contracts and know its meaning. And the instruction fails to include the necessary idea that if you believe that fraudulent representations were made by appellant's agent, that were relied on by appellee, and that appellant "had knowledge of."

On the third assignment of error I respectfully submit that there is no sufficient evidence in the record of the

evidence to sustain such an instruction. The attempt made by the appellee in the court below to prove a settlement of the account here sued on utterly fails when we view all the evidence for the appellee. If any settlement was made, Mr. Cameron, a witness for appellee, says it was made between an agent by the name of Wright, representing appellant, and by Mr. F. A. May, representing the appellee. Witness Cameron did not have the settlement, and only claims that he himself heard only part of the conversation; but Cameron had a conversation with another agent of appellant, to whom a tender of the patterns was made. On the other hand Mr. F. A. May, witness and agent for appellee, says positively that the alleged agent, Wright, stated clearly that whatever settlement they proposed would have to be referred to the home office of the appellant for approval. In my statement of facts I have quoted his exact language. If the testimony of May on this point is taken most strongly in favor of appellee the conclusion is inescapable that Wright had absolutely no authority to settle this large debt in any such way as has been contended by appellee. My objections to all this testimony and my motion to exclude the evidence on this point were all overruled by the circuit judge. Although the attempt to prove the agency of the alleged agent Wright was confined solely to the oral statement of Wright, yet the court granted this instruction, which I think violates the rule on proving agency outright. *Railroad Company* v. *Cocke,* 64 Miss. 713; *Kinnare* v. *Gregory,* 55 Miss. 615; 10 Ency. Evidence, page 15, and citations from many states.

The burden of proving the agency of Wright rests on the appellee, who alleged the agency. *Life Insurance Co.* v. *O'Dom,* 100 Miss. 218. If it be contended that some other agent came to the appellee and made statements to it about the proposed settlement, then I contend that the oral settlement or admissions of agency by such other alleged agent are inadmissible, in view of

the holdings in the above cited decisions and in *Rumbough* v. *Southern Imp. Co.*, 17 S. E. 536, 34 Am. St. Rep. 528.

If my contentions as above presented are correct, then a reversal of the case will be ordered.

Brady & Dean, for appellee.

The proof is absolutely undisputed on the question of the wily inducements held out before Mr. F. F. Parsons, to get him to take the large stock of patterns which the agent wanted him to take. Appellant had full opportunity to take the depositions, or procure the attendance, of the respective agents who visited Brookhaven to secure, in the first place, and later replace this contract, and did not do so. That contract, so fearfully and wonderfully constructed, is guaranteed to give a week's headache to any one who will sit down and try to dissect, masticate and digest it. Mr. Cameron stated that when he later tried to have an agent interpret it to him, he could not do so himself. Bear in mind that, according to the method pursued by this concern, the contract is placed in the form of an "order," the McCall Company thus trying to beat the devil around a stump, and throw the responsibility upon the very person, firm or corporation whom they were trying to inveigle into handling their patterns. The agent, therefore, sat down by Mr. Parsons and explained to him just what that instrument meant, explained the standing credit, so clearly and kindly worked out by him, explained how he would get full credit for returned patterns, leading him to believe that his account would thus be reduced, instead of his losing the value of patterns against which he did not order duplicates and thus, by false and fraudulent representations induced Mr. Parsons to affix his signature to the "order," after which a duplicate was returned to Mr. Parsons who glanced through it and laid it away, leaving the matter to the honesty of the McCall Company, and making remittances monthly as called upon by them, until business

reverses made it imperative that the pattern department be dropped, when, for the first time, the company stepped out into the open.

There is no issue raised by the testimony on this point, but if there was, then the jury has resolved it in appellee's favor. It is not a question of "dealer's talk," of varying the terms of written instruments; it is a question of false representations going to the heart of a contract during the five years of its existence.

Appellee secured only two instructions from the court, while appellant secured five. All of the objections noted against the instructions granted appellee, even if they really existed, were fully covered by the instructions granted appellee, even if they really existed, were fully covered by the instructions granted appellant, and the instructions must be construed together. The law was properly announced to the jury, so far as appellee's instructions went.

Wright's agency is not proved merely by his own statements. Nor is the agency of the other so proved. The Parsons, May, Oberschmidt Company wrote to the McCall Company to make other arrangements about their supply of patterns, and that company promptly sent its representative. Every circumstance pointed to his capacity to act, and he proceeded to elucidate the mysteries of that contract order, putting upon doubtful terms and phrases the interpretation calculated to induce Mr. Parsons to sign it, and upon these representations Mr. Parsons relied and acted. The jury found that he was such an agent, and found that the McCall Company was under obligations to take patterns to the amount of two hundred and fifty dollars, which were tendered into court, and this finding was correct.

Upon defendant and appellee's alternate theory of defense, the making of the new contract, the verdict denying appellant recovery of this item of two hundred and fifty dollars is likewise correct. This testimony not only

goes to prove the correctness of Mr. Parson's contention regarding the terms of the original contract, but in itself relieves appellee of liability, at least to the amount of two hundred and fifty dollars. An unbiased reading of the testimony of F. A. May, quoting against Wright, will show the justice of this finding. Mr. May testified as follows: "He says this: I'll write it to my company and have them to send you a contract down for this business. It will be all right with them, but I'll get it in writing from them and have them send you a contract, as we have agreed on."

Following their (apparently) usual custom, the McCall Company endeavored to slip in another agreement on May & Cameron, but taught by their former experience they refused to bite. At that time, as the agent told them and as the correspondence with Seavey shows, a contract had already been entered into with A. C. Seavey & Sons, and May & Cameron were asked to take the contract over only until August. Then when The McCall Company tried to "slip one over" on A. C. Seavey & Sons, and give them the Parsons, May, Oberschmidt Company patterns, Seavey balked, and the McCall Company tried to "rue back."

For a third reason, which this court will consider, although the lower court did not, this judgment must be affirmed as to the two hundred and fifty dollars namely, the illegality of this contract under the anti-trust laws of the state of Mississippi, in chapter 140 of the Code of 1892 and chapter 145 of the Code of 1906.

This is a suit on the contract. The declaration could not have been drawn more specifically upon this point, and it even uses the word "debt on contract." In his brief, following the decision in *McCall Company* v. *Hughes,* 59 So. 794, appellant's counsel endeavors to forget the language of the declaration and treat the suit as one on open account. Appellee still has his remedy separate from the contract, but he cannot sue on con-

tract and recover on open account. In any view of this case, the verdict of the jury, and the judgment of the court, as to the two hundred and fifty dollar item was correct, and should be affirmed by this court.

Smith, C. J., delivered the opinion of the court.

On the 12th day of September, 1905, a contract was entered into between appellant and appellee, the parts of which material to this controversy are as follows:

"The McCall Company, New York, N. Y.

"Please deliver to . . . at New York City, addressed to us a stock of McCall Patterns, at the uniform price of seven and one-half cents for each pattern (excepting those retailing for ten cents, the price of which is five cents each), amounting to four hundred and ten dollars and twenty-four cents net, including the November issue, one hundred and sixty-four dollars and twenty-four cents payable thirty days after shipment, and the balance, two hundred and fifty dollars is to remain as a standing credit during the term of this contract order, upon which interest is to be paid by us at the rate of five per cent per annum, semiannually, January and July 1; also ship us each month by . . . not exceeding an average of twenty-five dollars per month of your selection of the new monthly patterns, at same price as above, commencing with December issue; also Fashion Sheets and other publications in quantities, and at prices specified below, during the term of this contract, commencing with November issue.

. . . . . .

"We will reorder at the prices above named, once each week, or oftener, all patterns sold, thus keeping patterns on hand as above specified. The patterns are not to be sold for other than catalogue retail prices, and the stock of patterns is to be kept and offered for sale on the first (main) floor. We will send you an inventory of our stock of patterns on hand at your request, not exceeding twice each year.

"All goods ordered for delivery are to be paid for on or before the 5th day of the month succeeding date of shipment; if not then paid, subject to sight draft. All prices quoted are net.

"We will not sell any other patterns than the McCall Patterns received from you during the term of this contract order.

"We will not transfer the stock of McCall Patterns from Brookhaven, Mississippi, without your written consent, and will pay all transportation charges to and from your New York office.

"Discarded Patterns.

"All patterns purchased from you under this contract order that are reported discarded by you semiannually—January and July—can be returned by us at one hundred per cent contract price, in exchange for other patterns at full contract price, at any time within sixty days from the date such discarded patterns are respectively reported by you, provided this contract shall be in force at the time of such return. All patterns returned by us under any such discard report are to be credited to a special account, to be known as our discard exchange account, the credit to same to continue for a period of six months from the date of such discard report unless this contract shall be sooner terminated; and all patterns ordered by us within such period of six months while this contract is in force, excepting our monthly standing order, shall be charged to such discard exchange account unless our credit to the same is earlier exhausted."

The contract further provided that it should remain in force for five years.

Several months prior to the expiration of the five years for which this contract was to run, appellee decided to discontinue business, and so advised appellant. At that time there was a considerable balance due appellant, and, in addition, under the contract it was entitled to ship and

to receive payment from appellee for the several monthly shipments of patterns thereafter to be made as provided for in the contract. Appellant sent one of its agents, a Mr. Wright, to see what adjustment of the matter could be made with appellee, but nothing tangible resulted from his efforts. Afterwards this suit was instituted in the court below to recover from appellee the sum of three hundred and eighteen dollars and sixty-eight cents, the amount alleged by appellant to be due it under the contract. Two hundred and fifty dollars of this amount was the standing credit referred to in the contract, and the remainder was the balance due on the monthly shipments of patterns. To appellant's declaration appellee pleaded the general issue, and gave notice of special facts to be set up in bar of appellant's claim, and also a special plea, setting up practically the same facts as contained in the notice. The defense thus set forth is that in so far as the two hundred and fifty dollars is concerned, appellant does not owe it, for the reason that it was "understood and agreed that defendant was not to pay said sum, but was to take patterns to that amount, over and above what were paid for in cash, was then to pay interest on their value, and plaintiff would, at the expiration or breach of said contract, retake patterns from the stock in defendant's possession to the value of two hundred and fifty dollars;" and in so far as the remainder of the account is concerned, appellee has more than paid it, for the reason that it had returned to appellant at various times discarded patterns worth, under the terms of the contract, more than this balance claimed to be due. Judgment over was requested against appellant for the amount claimed to have been so paid it in excess of the amount due. The cause was submitted to the jury and a verdict rendered for appellant in the sum of one hundred and eighteen dollars and sixty-eight cents. Both parties being dissatisfied with this result, each filed a motion for a new trial, and upon the overruling thereof

each has appealed to this court, appellant by direct and appellee by cross-appeal.

Over the objection of appellant, Mr. Parsons, a member of appellee corporation, and who seems to have entered into the contract with appellant, on behalf of appellee was permitted to testify that the agent who represented appellant in the execution of the contract told him, at the time the contract was executed, that the words, "standing credit," in the contract meant that appellees would not be called upon to pay the sum of two hundred and fifty dollars designated therein as standing credit, but that at the expiration or discontinuance of the contract appellant would accept in settlement thereof patterns of the value of two hundred and fifty dollars. This evidence should not have been admitted, for the reason that it was simply an attempt to vary by parol the terms of a plain and unambiguous contract. This feature of appellee's defense was presented to the jury by means of the following instruction:

"The court instructs the jury for the defendant that if they believe the defendant was induced to sign the contract by false representations made by plaintiff's legal representative empowered to make contracts for fraudulently inducing defendant to sign the contract, they will find a verdict for the defendant."

And appellee's counsel place the competency of the evidence not so much upon a right in appellee to show by parol what the parties to this contract at the time of its execution understood to be the meaning of that clause of the contract here under consideration, but upon the ground that appellee was induced to enter into the contract by reason of the false and fraudulent statement of appellant's agent that under the terms of the contract appellee could not be called upon to pay the two hundred and fifty dollars in money, but could only be called upon to deliver to appellants patterns of that value, and that on account of this fraud perpetuated upon appellee it is

released from the obligation of that portion of the contract. There is no merit in this contention. The same argument can always be made when it is sought to vary a contract by parol on the ground that the parties thereto placed a construction upon it at variance with its plain meaning.

Another of appellee's instructions was that:

"The court instructs the jury for the defendant that if they believe from the evidence that the contract between the plaintiff and defendant was by mutual consent terminated, and the defendant's tender of patterns on hand accepted in settlement of its debt, then their verdict will be for the defendant."

This instruction was based upon the evidence of the attempted settlement of this controversy by appellant's agent, Wright. The testimony on this point was that Wright, appellee, and the firm of May & Cameron entered into an agreement that appellees should be released from all liability to appellant, that its stock of patterns should be turned over to May & Cameron, who would assume appellee's liability therefor and carry out appellee's contract after certain modifications had been made therein, and that this agreement would have been carried out by May & Cameron had it not been violated by appellant. Conceding that appellant's agent was authorized to enter into a contract of this character, and to thereby release appellee from further liability, the evidence clearly discloses that he did not assume any such authority. While such a contract was agreed upon and reduced to writing, it was to be submitted to appellee for approval. This was done, and it was signed by appellant and returned for appellee's and May & Cameron's signature. For the reason that in their judgment the contract as written was different from the one agreed upon with Wright, both appellee and May & Cameron refused to sign it, so that it never became operative, and consequently appellee was not released from liability thereby. The instruction therefore, should not have been given.

One of appellee's contentions on the cross-appeal is that it has not received the proper credit for discarded patterns returned to appellant under the last clause of the contract, which reads as follows:

"All patterns purchased from you under this contract order that are reported discarded by you semiannually—January and July—can be returned by us at one hundred per cent contract price, in exchange for other patterns at full contract price, at any time within sixty days from the date such discarded patterns are respectively reported by you, provided this contract shall be in force at the time of such return. All patterns returned by us under any such discard report are to be credited to a special account, to be known as our discard exchange account, the credit to same to continue for a period of six months from the date of such discard report unless this contract shall be sooner terminated; and all patterns ordered by us within such period of six months and while this contract is in force, excepting our monthly standing order, shall be charged to such discard exchange account unless our credit to the same is earlier exhausted"

—and upon the testimony of one of appellant's employees, which was to the effect that at various times appellee returned to it discarded patterns the value of which was in each instance credited to the special exchange account provided for by the contract, and that on several occasions appellee failed to order a sufficient number of new patterns to exhaust its credit for those returned before such credit lapsed under the terms of the contract. Appellee's claim is that it is entitled to have the difference between the value of all patterns returned by it and of the new patterns ordered credited on its indebtedness for the patterns originally purchased by it, and the amounts due by it for the patterns shipped to it under the regular monthly order provided for in the contract. There can be no merit in this contention, for the contract in express language provides otherwise.

Another of appellee's contentions is that since this contract contains the following clause:

"We will not sell any other patterns than the McCall Patterns received from you during the term of this contract order"

—it is illegal and void under our anti-trust statutes, and therefore that appellant cannot recover the value of the patterns sold and delivered under it. Granting that this provision of the contract violates our anti-trust laws, it has been expressly held in *McCall* v. *Hughes,* 102 Miss. 375, 59 So. 794, 42 L. R. A. (N. S.) 63, that appellee is not released thereby from the payment of the amount due by it for the patterns received.

Reversed and remanded.

BENNETT, SHERIFF AND TAX COLLECTOR, *v.* JONES, *et al.*

[66 South. 277.]

1. LICENSES. *Privilege tax. Penalty for non-payment. Statutory provisions.*

There is nothing in chapter 104, Laws 1912, levying a privilege tax on certain places, and providing in section 7 that all laws and parts of law in conflict therewith are repealed, in conflict with section 3901, Code 1906, which provides that all persons liable for a privilege tax who shall fail to procure the license during the month in which it is due, shall be liable for double the amount of the tax and hence the code section applies to taxes levied under such chapter 104, Laws 1912.

2. LICENSES. *Providing tax. Penalty for non-payment. Statutory provision.*

There is nothing in chapter 210 of the Law of 1910, which amends section 3899 and section 3905, and repeals sections 3897 and 3898 of the Code of 1906 in conflict with section 3901, nor is there anything in section 3901 violative of the constitution.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Petition by W. T. Jones and others for a writ of mandamus against J. D. Bennett, sheriff and tax collector. From a judgment overruling a demurrer to the petition and directing the issuance of the writ, defendant appeals.

The facts are fully stated in the opinion of the court.

Sullivan & Conner, for appellant.

The single question presented by this record is whether or not a person whose duty it is to pay a privilege tax during the month of April and who fails to do so and thereby becomes liable for double damages, as provided by section 3901 of the Code of 1906, is entitled, notwithstanding his default and liability for double the amount of the tax, to have the licenses issued to him on payment of the original tax without paying the double amount. Section 3901 of the Code of 1906 is as follows: "All persons or corporations liable for privilege tax who shall fail to procure the license during the month on which it is due shall be liable for double the amount of the tax, and it is hereby made the duty of the tax collector to collect the amount, issue a separate license therefor, and to endorse across its face the words "collected as damages." Section 3902 of the Code of 1906 is as follows: "On all licenses not paid during the month when due, and on which double tax is collected, the tax collector shall be entitled to retain one-half of said damages as compensation for his extra service, in addition to the regular commissions now allowed by law on the regular collection."

The law makes it the duty of any person engaged in conducting a business on which a privilege tax is levied to pay the tax and take out the license during the month in which it is due. Such person is not legally entitled to do business without taking out this license during the month

in which it is due. If he fails to take out the license during the month in which it is due, then, according to section 3901, Code of 1906, he owes as a privilege tax twice as much as he would have owed if he had taken out the license at the proper time. Section 3901 says he shall be liable for double the amount of the tax, and that section makes it the duty of the tax collector to collect the amount and issue the separate license therefor and endorse across its face the words "collected as damages." It is as much the duty of the person carrying on the business to pay the double tax after he is in default as it was his duty to pay the single tax before he was in default. If the privilege license taken out during the month in which the license is due constitutes the authority for the person to do business and is the evidence that he has complied with the law and is, therefore, entitled to conduct the business, then the two privilege licenses provided for by section 3901, to be issued after default, constitute the evidence that the person doing the business has complied with the law and is entitled to carry on the business covered by the licenses. In other words, before default, if the person pays the tax in the month in which it is due he pays a single tax and obtains a single license and is authorized thereby to conduct the business, but if he waits until he is in default it is his duty to pay twice as much tax or double tax, and to obtain a saparate license for each of the two amounts before he is entitled to do business. It is manifestly the intention of section 3901 that the tax collector shall require the person who is in default to pay a double tax before any license can be issued to him authorizing him to do business. Section 3902, Code of 1906 provides that one-half of the additional tax imposed shall be retained by the tax collector as damages for his extra service, in addition to a regular commission allowed by the law on a regular collection. Under this section the other one-

half of the double tax or increased tax, belongs to the state of course, and it is the duty of the tax collector to pay it over less his commission on that one-half.

The appellees contend that section 7, chapter 104, Laws of 1912, had the effect to repeal section 3901, Code of 1906, in so far as collecting the double tax is concerned. Chapter 104, Laws of 1912, provided for a tax of four hundred dollars on pool rooms in towns of not less than 10,000 inhabitants, and also provided for privilege tax on certain other occupations. Section 7 of said act provides that "all laws and parts of laws in conflict with this act are hereby repealed." Section 3901, Code 1906, is not in conflict with chapter 104, Laws 1912; section 3901 is a general provision for the collection of privilege tax after default and for double that tax when not paid in the month in which it falls due. The laws in conflict with chapter 104, Laws of 1912, are such laws as levy a different privilege tax on the callings named in chapter 104, Laws 1912, than the tax therein provided. For instance, section 3778, Code of 1906, puts a privilege tax of seventy-five dollars on pool rooms in cities of not less than 5,000 inhabitants, whereas in chapter 104, Laws of 1912, one hundred dollars is the minimum tax on any pool room, and two hundred dollars is the tax in cities of less than 7,500, but not less than 2,500 inhabitants. Section 3778, Code of 1906, is in conflict with chapter 104, Laws of 1912, and is repealed by it, but there is no conflict as to section 3901, Code of 1906.

We respectfully submit that the judgment of the court below should be reversed.

Tally & Mayson, for appellee.

It is to be observed in the first place that section 3778 of the Code of 1906, fixes the privilege tax on persons operating a pool room in cities the size of Hattiesburg and larger at seventy-five dollars. This section of the Code was amended by chapter 73, page 56, of the Acts of

1908, but that Act nowhere fixes a penalty for the failure to obtain the privilege tax in the time as prescribed by the code. Under chapter 104, page 83 of the Act of 1912, the legislature passed an independent (not an amendatory) act fixing the license for operating the pool rooms in cities the size of Hattiesburg at four hundred dollars, but nowhere in that act was there any reference to any other act; and, besides, section 7 of the act repealed all laws and parts of law in conflict with the Act in question.

The Act of 1912, then, is not an amendatory act, but an independent act, and if any penalty or punishment is to be visited upon anyone for an infraction thereof, certainly the act should prescribe the penalty, and especially where the penalty is so drastic as that denounced by section 3901 of the Code. Should it be insisted that the Act of 1912 was not an independent but an amendatory, act, then, the act itself is in palpable violation of section 61 of the Constitution of the state, because no reference whatever is made in the act under consideration either to the Code of 1906, or to it. It follows then, that as an amendatory act, it would fall clearly within the inhibition of section 61 of the Constitution, and as such would be void. An amendatory act must contain some words which indicate the theme or provision which the act sought to be amended treats: *State* v. *Superior Court,* 92 Am. St. Rep. 831, 28 Wash. 317, 68 Pac. 957; *Sample* v. *Verona,* 94 Miss. 264, 48 So. 2; *Board of Levy Com. Y. & M. Delat* v. *Royal Ins. Co.,* 96 Miss. 832, —— So. 2. These latter cases holding that the title must be in conformity to section 71 of the Constitution and clearly express in it the section, or sections, of the law proposed to be amended.

Where a statute is intended as a substitute for a former statute it repeals such former statute, and though there be a plain case of *casus omissus,* the court cannot supply. *Clay County* v. *Chickasaw Co.,* 64 Miss. 543, 1 So. 753.

In the case of *State, ex rel. Adams* v. *Lodge* 16, *B. P. O. E.*, 13 So. 255 (not officially reported), the court held that section 2 of the Act of February 24, 1890, with reference to the sale of liquor was repealed by a new law as the section of the old law was omitted. Everything falls with an abrogated law not fully executed, except where contract rights have vested, and this is especially true in matters of taxation: *Bradstreet* v. *Jackson,* 81 Miss. 233, 32 So. 999.

The court in construing a statute which has been amended, must look at it as it stands after the amendment, construing the amended statute according to the natural signification of the words. *George* v. *Woods,* 94 Miss. 268, —— So. 147.

Penal statutes: Penal statutes cannot be extended by implication: Southerland on Statutory Construction, sec. 350; 36 Cyc. 1113; *Merrill* v. *Melchoir,* 30 Miss. 516. Statutes in their nature penal should not be extended by construction beyond their meaning: *Independent School Dist.* v. *Collins,* 128 Am. St. Rep. 76, 15 Idaho, 535, 98 Pac. 857; *Elliott Col. Int. Rev.* v. *East Penn. R. R. Co.,* 91 U. S. 492, 25 L. Ed. 292. If a statute be less comprehensive than the legislature intended, it is for that body to extend its operation and not for the court to do so. *Southerland* v. *Commonwealth,* 132 Am. St. Rep. 949, 109 Va. 834, 65 S. E. 15. Penal statutes are nonflexible, and can be made to embrace nothing which is not within the intent of the legislature in passing them. If other things equally injurious seem to deserve the same punishment, the legislature alone can provide for it. *Shaw* v. *Clark,* 43 Am. Rep. 474, 49 Mich. 384.

Legislative intent: Since the legislative intent furnishes criteria for the interpretation and construction of statutes, for the purpose of this investigation, we might examine, with profit, the other privilege tax statutes passed at the same session of the legislature and ascertain if they shed any light on the question of intent.

The act under consideration is chapter 104, page 83, Acts 1912. As before stated, there is no penalty denounced in this statute for the failure to take out privilege tax during the month of the expiration thereof. There are quite a number of other privilege tax laws passed at the same session of the legislature, and it is to be especially noted that practically all these other statutes contain penalties for their infraction.

It is therefore, respectfully submitted that the case should be affirmed, and among other reasons, we submit the following. That the Act of 1912, chapter 104, page 83, is a new and independent act and repeals expressly and by implication sections 3901 and 3902 of the Code; that if it be insisted that the Act of 1912 is amendatory of the Code and the Act of 1908, then it is without validity, as it contravenes sections 61 and 71 of the Constitution.

The appellees are entitled to the privilege tax license upon paying the fee required by law, whether the penalty denounced by section 3901 of the Code is collectible or not.

REED, J., delivered the opinion of the court.

Appellees filed their petition in the circuit court of Forrest county, praying for a writ of mandamus to compel appellant, the sheriff and tax collector of that county, to issue to petitioners a privilege tax license, authorizing them to conduct the business of a pool room upon their payment of the sum of four hundred dollars, the amount of the privilege tax required by law.

Appellees were conducting a pool room, under the name of "Smoke House," in Hattiesburg, a city of less than 20,000, but not less than 10,000, inhabitants. Their privilege tax license expired on April 1, 1914. They failed to procure a license during April, 1914, being the month in which such license was due. In May, 1914, they offered to pay appellant, the sheriff and tax collector, the amount

of four hundred dollars as a privilege tax, and requested the issuance by him of the license. He refused to receive the amount and issue the license, and demanded eight hundred dollars, being double the amount of the tax which he claimed he was compelled to collect by the requirements of section 3901 of the Code of 1906.

Appellees stated all this in their petition, and claimed that, by reason of the enactment of chapter 104 of the Acts of 1912, which is an act to raise revenue by levying privilege taxes on places for bowling alleys, billiards, Jenny Lind, pool tables, etc., and which specifies that the tax on the pool room in a city the size of Hattiesburg should be the amount of four hundred dollars, and particularly, because of the provision in section 7 of the act that all laws and parts of laws in conflict therewith are repealed, section 3901 of the Code has no application at present, and that there is now no law in force requiring the collection of the penalty for failing to pay the privilege tax under the act of 1912. Appellant filed his demurrer to the petition, in which he assigned as a ground that he was required by section 3901 to collect double the amount of the privilege tax, because appellees were in default and had failed to procure their license during the month in which it was due. The demurrer was overruled, and the court directed the issuance of the writ of mandamus, commanding appellant, as sheriff and tax collector, to issue and deliver to appellees, upon the payment by them of the sum of four hundred dollars, a privilege tax license as of date the 1st of April, 1914, expiring on the 1st of April, 1915.

Section 3901 of the Code of 1906, which provides damages in case of failure to procure a license reads:

"All persons or corporations liable for privilege tax who shall fail to procure the license during the month in which it is due shall be liable for double the amount of the tax, and it is hereby made the duty of the tax collector to collect the amount, issue a separate license therefor,

and to indorse across its face the words 'Collected as damages.' ''

We see nothing in chapter 104 of the Laws of 1912 in conflict with section 3901. Chapter 104 is an act to raise revenue by levying privilege taxes on certain places, including places operating pool tables. This act is in conflict with section 3778 of the Code of 1906 levying taxes on places for pool tables, etc., and, being in conflict, will repeal that section. So in like manner chapter 104 will operate to repeal all other laws enacted before its date which provide a privilege tax on places for pool tables, etc.

Section 3901, however, is not a law to raise revenue by levying privilege taxes. It is a general provision of the statute laws for the collection of privilege tax after default has been made, by imposing a penalty in the way of damages amounting to a double tax. It applies to all privilege taxes imposed by legislative enactment, unless there is some provision in the act levying the tax to prevent its operation. We find no such provision in the act of 1912.

We see nothing in chapter 210 of the Laws of 1910 which amends section 3899 and 3905, and repeals sections 3897 and 3898 of the Code of 1906 in conflict with section 3901, nor do we see anything in the section violative of the Constitution.

The trial court erred in overruling the demurrer, and directing the issuance of mandamus. The sheriff was performing his duty, made by the plain requirements of the statute, when he refused to issue the license until double the amount of the tax had been paid him.

Reversed. The demurrer is sustained, and the petition dismissed.

Reversed.

LEE v. McMORRIES.

[66 South. 278.]

1. DEEDS. *Consideration. Failure. Cancellation. Vendor and vendee. Agreement to support grantor.*

Failure to furnish support in accordance with a promise, which becomes the consideration for a deed absolute in form is not sufficient to support a suit for its cancellation.

2. VENDOR AND VENDEE. *Vendor's lien. Agreement to support grantor.*

There is no implied equitable lien in favor of a grantor of real estate to secure a consideration therefor, which is an agreement to support the grantor during life. The reason being that the charge is too uncertain, and indefinite in character.

APPEAL from the chancery court of Lauderdale county.

HON. SAM WHITMAN, JR., Chancellor.

Suit by Edwin McMorries, trustees, against Blewett Lee, and others. From a decree in favor of complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

Scott & Christian, for appellant.

Counsel for appellee takes the position that the failure to support in accordance with the agreement expressed in the deed is a failure of consideration. This, I contend is not so. I think that Mrs. Daly would have given Mrs. McCarthy the property without any promise from her to support Mrs. Daly and I do not believe that this was a part of the consideration at all; but, for the sake of argument, I am going to assume that this was a part of the consideration and see where it leads us. If the promise to support is a part of the consideration for the conveyance of the property and there is a failure to support, what then? Does a vendor's lien in favor of the grantor exist? If not, does the con-

veyance amount to an equitable mortgage as contended by counsel for appellee?

As to the first proposition we may rely upon 39 Cyc., pages 1791 and 1792, where the following language is used: "A vendor is not entitled to a lien where the consideration for the conveyance is a covenant or agreement to support the grantor during life, as it is of such a nature that the court cannot accurately ascertain and define the amount of the charge to be thus imposed upon the land. There is ample authority for this statement and as it is not questioned by appellee, as I understand their briefs, I will hurry to the next proposition, upon which, in my opinion, they must either stand or fall.

I concede that there are cases where language in a deed or other instrument which amounted to an agreement to support the grantor for life, has been held to convert the deed into an equitable mortgage. But there is more authority holding the other way. In every case of this kind the distinguishing mark has been the query: Does the language in the instrument, whereby support of the grantor or other party is promised, make it apparent that the property was, by the intention of the parties, to be charged with the support of the party to be supported? The clearest and best statement of the law applicable to this case that I have been able to find after an exhaustive search in the case notes, is 13 L. R. A., page 725. The law is there stated in these words: "The present note is limited to those cases which discuss his right to an equitable lien on the premises conveyed. It appears to be well settled that an implied equitable lien does not exist in favor of a vendor of real estate to secure the consideration therefor, when such consideration is the maintenance and support of the grantor during life, some cases stating as the reason therefor that the charge is of too uncertain and indefinite a character (*Peters* v. *Tunnell,* 43 Minn. 473, 19 Am. St. Rep. 252, 45 N. W. 867; *Arlin* v. *Brown,* 44 N. H. 1020;

Brawley v. *Catro,* 8 Leight 522; *Crim* v. *Holsberry,* 42 W. Va. 667, 26 S. E. 314), while in other cases a lien is denied upon the ground that the covenant of the vendee is substituted for the purchase money, or as a mode of payment of the price of the land, and therefore the land is discharged of the lien (*Meigs* v. *Dimock,* 6 Conn. 458; *Arlin* v. *Brown, supra*; *McKillip* v. *McKillip,* 8 Barb. 552; *Camp* v. *Gifford,* 67 Barb. 434; *McCandlish* v. *Keen,* Gratt. 615.)"

The foregoing is the general rule. It is qualified by the following: "This doctrine however, will not preclude courts of equity from charging the grantor's support upon the premises, whenever, from the language of the parties or the attending circumstances, they can infer an intention to create such a charge." From the foregoing we see that it is well settled that there is no implied lien upon the property in cases of this kind. There was no express lien reserved and there is no vendor's lien contended for and this is made certain under the general law and also cases from our own court. *Griffin et al.* v. *Byrd,* 19 So. 717. This case holds that there can be no vendor's lien unless the money for which the lien is cleaimed is fixed and certain. It could not be contended that the amount necessary to support the grantor in this case was either fixed or certain.

Sams & McCall, for appellee.

We respectfully call the court's attention to the following cases which hold expressly that a conveyance similar to the conveyance in question passes title subject to the incumbrance or mortgage for the balance of the unpaid purchase price.

The case of *Abbott* v. *Sanders,* 66 Atl. 1032, holds that a conveyance, such as the deed in question, would be treated as a mortgage, and in case of breach by the grantee, equity may grant relief by foreclosure, forfeiting and extinguishing the grantee's rights, etc. This

case also quotes authorities from Illinois, Oregon, Rhode Island, and Indiana, as well as other authorities from Vermont, Kentucky, Iowa, Michigan and West Virginia.

In the case of *Ringrose* v. *Ringrose,* from the supreme court of Pennsylvania, of recent date, found in 33 Atl. 129, where there was a recitation of a consideration of three thousand dollars, recited to have been paid in the deed, and the further consideration of agreeing to support mother and father by the grantee who was the son, and this court held that in case of failure of the grantee to furnish support, that equity was the proper forum to restore the *status quo* in event of a breach by the grantee of the covenant in said deed. The grantee not having performed all of the terms of agreement and the lands conveyed having been sold, it was held that the terms of the conveyance would be enforced as against the purchaser, for the reason that it was apparent from the face of the deed that something remained for the vendee to do before his title became perfect, and that he might be viewed in the light of a trustee in equity for the vendor even though the vendee might have received a legal title to said property. The court of equity looks to the substance of the agreement, not to the form, and enforces the intention of the parties to said contracts or deed, using this illustration: "A conveys land to B, and B thereby agrees to support the grantor, and B takes his title clogged with this expression of the purpose of the conveyance to him; wherever it can be inferred that the purpose of support is implied from the words of the deed, courts of equity will enforce such purpose."

The case of *Gilchrist* v. *Foxen,* 70 N. W. 587, enforced, in a court of equity, the right of the vendor as against a third party on the idea that the conveyance was in its nature a mortgage which gave notice to all purchasers of the right of the vendor to have the title revested in said vendor in the event of a failure on the part of the vendor to comply with the condition of said conveyance.

In the case of *Grant* v. *Bell,* 58 Atl. 951, the supreme court of Rhode Island, in 1904, held that a conveyance made for the support of the grantor by the grantee, creates an implied trust which can be enforced in a court of equity—citing cases from Virginia, Georgia, Vermont, Kentucky, Illinois, Connecticut and Michigan. In this case the grantee assumed and paid a mortgage on the lands conveyed, besides the agreement to support the grantor.

As shown by the above cases and the vast array of authority cited thereunder, the overwhelming weight of the modern doctrine supports the position taken by the learned chancellor in the case at bar, and we respectfully submit that the lien fixed by the decree should stand as handed down by the chancellor.

REED, J., delivered the opinion of the court.

Mrs. Annie Daly, an elderly lady, on July 10, 1909, executed a deed conveying to her granddaughter, Miss Annie Louis Foley, certain real estate in the city of Meridian. The consideration is stated in the deed in the following words:

"Whereas, my granddaughter, Annie Louis Foley, has for a long time devoted herself to the affectionate care of me in sickness and in health, and in further consideration that she is to take me to the home hereinafter described and to care for me, as she has heretofore done, until I die, and in further consideration of the love and affection I bear to said granddaughter, I hereby sell, alien, convey and warrant. . . ."

Miss Foley afterwards intermarried with J. G. McCarthy. On July 13, 1910, Mrs. McCarthy and her husband executed a deed of trust on the real estate conveyed by Mrs. Daly, to the Union Bank & Trust Company, as trustee, to secure to appellant, Blewett Lee, a loan evidenced by their promissory note in his favor. On September 1, 1910, Mrs. Daly executed an instrument of

writing whereby she conveyed to appellee, Edwin McMorries, as trustee, her entire estate, real, personal and mixed, of whatever description and wherever situated, empowering him generally to collect all amounts due her and control and manage her property, and particularly to enter such proceedings as he might deem best, to recover and assert rights to the property which she had conveyed to her granddaughter. Appellee, on December 20, 1910, filed his bill of complaint, and later an amended bill, averring that there had been a failure of consideration in the deed from Mrs. Daly to Mrs. McCarthy, in that Mrs. McCarthy had not carried out the stipulation in the deed that she should support Mrs. Daly. Mrs. McCarthy, the Union Bank & Trust Company, and appellant, Blewett Lee, were made parties defendant. Appellee prayed that the deed from Mrs. Daly to Mrs. McCarthy, dated July 10, 1909, and the deed of trust from Mrs. McCarthy and husband to secure the loan from appellant should be canceled and held for naught, and that the title to the real estate should be revested in him. He further prayed that if he had not asked for proper relief, a charge should be fixed upon the real estate for the support and maintenance of Mrs. Daly to the extent of one hundred dollars per month and such charge made a lien. A demurrer to the amended bill was overruled. The case then proceeded to trial upon answer and proof. The chancellor, on final hearing, decreed that Mrs. McCarthy had breached the deed by failing to comply with the covenants thereof, and that Mrs. Daly suffered damages to the extent of one thousand, two hundred dollars, for which a personal decree was given. He refused to cancel the deed, but decreed a first and paramount lien on the property for the payment of the amount of the personal decree. From this action of the chancellor, appellant prosecutes this appeal.

In the case of *Dixon* v. *Milling,* 102 Miss. 449, 59 So. 804, 43 L. R. A. (N. S.) 916, this court held that:

"Failure to furnish support in accordance with a promise which becomes the consideration for a deed absolute in form is not sufficient to support a suit for its cancellation."

The question for our decision in this case is, Did Mrs. Daly, the grantor, have a lien upon the real estate she conveyed, to secure such amount as might be required for support provided for in the consideration of her deed?

It has been held that there is not an implied equitable lien in favor of a grantor of real estate to secure a consideration therefor, which is an agreement to support the grantor during life. The reason for this seems to be that the charge is too uncertain and indefinite in character.

Discussing the requisites, extent, and effect of such lien, Mr. Pomeroy, in his Equity Jurisprudence (3d Ed.), sec. 1251, says:

"The grantor's lien, wherever recognized, is only permitted as a security for the unpaid purchase price, and not for any other indebtedness nor liability. There must be a certain, ascertained, absolute debt owing for the purchase price; the lien does not exist in behalf of any uncertain, contingent, or unliquidated demand."

In the case of *Arlin* v. *Brown,* 44 N. H. 102, it was decided that no lien would exist where the only consideration for the conveyance is the agreement of the vendee to support and maintain the vendor during the life of such vendor, and Judge SARGENT, delivering the opinion of the court, said:

"Where it appears that the consideration of a conveyance is that the vendee shall enter into covenants to do certain things, it has been held that there is no lien. *Clarke* v. *Boyce,* 3 Sim. 499; *Parrott* v. *Sweetland,* 3 Myl. & K. 655. This is upon the ground that the sale is made, not for a sum of money, but for a security of a different kind, which security itself is the consideration, and the

party having received that has been paid all that he contracted for. *Buckland* v. *Packnell,* 13 Sim. 406; *Dixon* v. *Gayfere,* 17 Beav. 421, 21 Beav. 118. This principle is held in *Brawley* v. *Catron,* 8 Leigh (Va.) 522, 528, where it is held that this lien will not be given by a court of equity as a security for unliquidated and uncertain damages, and will therefore not exist where the consideration of the sale is an engagement to support the vendor during his life."

It was deciced in the case of *Peters* v. *Tunell,* 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252, that there would be no implied equitable lien to secure the performance of a consideration which is an agreement to support the grantor during life. We quote from the opinion in this case as follows:

"It is in accordance with what is deemed to be the greater weight of authority that a vendor of real property is not entitled to an implied equitable lien to secure the performance of the consideration when that is of such a nature, as is that in this case, that the court cannot accurately ascertain and define the amount of the charge to be imposed upon the land and enforced out of it."

In *Burroughs* v. *Burroughs,* 164 Ala. 329, 50 So. 1025, 28 L. R. A. (N. S.) 607, 137 Am. St. Rep. 59, 20 Ann. Cas. 926, it was held that a lien did not exist where the consideration for the conveyance of land is an agreement to support the grantor during life. Judge MCCLELLAN, delivering the opinion of the court in that case, said:

"We think there can be no doubt that one essential condition to the creation of a vendor's lien is that there is a definite, 'ascertained, absolute debt, owing alone for the purchase price of the land conveyed'; on the contrary, that no such lien arises where the consideration for the conveyance is an uncertain, indefinite contingent demand."

Mrs. Daly, the grantor, was not entitled to an equitable vendor's lien upon the land she conveyed to secure the

amount required for her support. Such amount was unliquidated. It was uncertain and contingent. It was not an absolute, certain debt owing for the purchase price. It was indefinite in character. The chancellor erred in fixing the lien on the property.

Reversed and remanded.

FOREST PRODUCT & MFG. CO. v. BUCKLEY.

[66 South. 279.]

1. LOGS AND LOGGING. *Sale of standing timber. Cancellation. Courts. Rules of decision. Stare decisis. Partition. Nature of remedy. Sale of land.*

The owner of land in fee, who by warranty deed conveyed the timber standing thereon, together with the right to enter and remove the same, without limiting the time of its removal, is not entitled to a cancellation of the deed because the purchaser has failed to remove the timber in a reasonable time.

2. COURTS. *Rules of decision. Stare decisis.*

A former decision of the supreme court announcing a rule of property should not be departed from unless the rule therein announcing it is not only manifestly wrong but mischievous.

3. PARTITION. *Nature of remedy. Sale of land.*

The sale of land for a partition is regulated by statute, and is not dependent upon the common law, or the general principles of equity.

4. PARTITION. *Right of parties. Partition of land and standing timber.*

Under Code 1906, section 3521, providing for partition of lands held by joint tenants, tenants in common or coparceners, an owner of land, who has sold to another the standing timber thereon is not entitled to a partition since the parties do not hold as provided in the statute.

APPEAL from the chancery court of Lawrence county.
HON. R. E. SHEEHY, Chancellor.

107 Miss. 57

Bill by T. R. Buckley against the Forest Product & Manufacturing Company. From a decree overruling a demurrer to the bill, defendant appeals.

The facts are fully stated in the opinion of the court.

Green & Green, for appellant.

Butler, Easterling & Potter, for appellee.

SMITH, C. J., delivered the opinion of the court.

On May 18, 1899, appellee executed and delivered to the Pearl River Lumber Company the following conveyance:

"For and in consideration of the sum of one hundred dollars cash in hand to us paid, the receipt whereof is hereby acknowledged upon the delivery of these presents, we do hereby convey and warrant unto the Pearl River Lumber Company, a Mississippi corporation, all timber and timberlike trees being, growing, and standing upon the following described lands, situated, lying, and being in Lawrence Co., Mississippi, to wit: Northwest quarter of northeast quarter, section 22, township 9, range 20 west, forty acres more or less, with the right to enter, cut, and remove the same at pleasure; also the right to construct and operate a railroad or tramway over the same, and a perpetual right of way of one hundred feet between parallel lines for railroad purposes."

Afterwards the title to this timber by *mesne* conveyances from the Pearl River Lumber Company became vested in appellant. The timber conveyed by this deed remaining uncut, appellee filed his bill in the court below in December, 1910, alleging that, inasmuch as appellant and its grantors had failed to remove the timber within a reasonable time, it had lost all right so to do, as well as its title thereto, and praying, first, that the deed made to him to the Pearl River Lumber Company, together with the other conveyances by which the title

came to appellant, be canceled and held for naught; and, second, if mistaken in this, that the land, together with the trees growing thereon, be sold and the proceeds divided between appellant and appellee. In the brief of counsel for appellee it is stated that this division should be made as follows:

"The Forest Product & Manufacturing Company to be awarded the value of the pine timber growing on the land in 1899, and Buckley to be awarded the value of the land as land, and the value of the timber which has grown on the land since 1899."

To this bill appellant interposed a demurrer, and from a decree overruling this demurrer this appeal is taken.

Counsel for appellee frankly concede that, in order for the first of appellee's contentions to be sustained, it will be necessary for us to overrule the case of *Butterfield* v. *Guy,* 92 Miss. 361, 46 So. 78, 15 L. R. A. (N. S.) 1123, 131 Am. St. Rep. 540, but they very strenuously urge, after an exhaustive review of the authorities, that this case was not well considered, is unsound, and should be overruled. We have given this argument most careful consideration, and must decline to overrule *Butterfield* v. *Guy,* for the reason, first, that in our judgment that case was correctly decided; and, second, even should we concede its unsoundness, the rule there announced is one of property, to which contracts for the sale of standing timber can be easily made to conform. A former decision of this court should not be departed from, unless the rule therein announced is not only manifestly wrong, but mischievous. It follows, therefore, that appellee is not entitled to the cancellation of the deeds prayed for.

The sale of land for a partition is regulated by statute, and is not dependent upon the common law or the general principles of equity. Section 3521 of the Code provides:

"Partition of land held by joint tenants, tenants in common, or coparceners, having an estate in possession

or a right of possession and not in reversion or remainder, whether the joint interest be in the freehold or in a term of years not less than five, may be made by decree of the chancery court of that county in which the lands, or some part thereof, are situated," etc.

By section 3521 the court is authorized to sell the land when incapable of a partition in kind, and divide the proceeds thereof among the parties interested. It seems clear that the parties hereto do not hold the property in question either as joint tenants, tenants in common, or coparceners, and therefore they do not come within the terms of the statute. Appellee has parted with all of his title to the trees, and has no further interest therein. Appellant owns no part of the land as such, but simply owns the trees standing thereon, with the incidental right of having them remain on and receive sustenance from the soil until they shall be cut and removed. The situation of the parties hereto is substantially the same as that of persons who own different rooms in the same building, or as that created when the owner of the soil sells the coal or other mineral lying beneath the surface; and it has never been held, so far as we are aware, that parties thus situated are joint tenants or tenants in common. The case of *White* v. *Lefoldt*, 78 Miss. 173, 28 So. 818, seems to be conclusive of this controversy, for the reason that the ownership of the house in that case was similar to the ownership of the trees in the case at bar.

Appellee is entitled neither to a cancellation of the deeds nor to a sale of the land for partition. The decree of the court below will therefore be reversed, the demurrer will be sustained, and the bill dismissed.

Reversed.

INDEX

ACCOUNTS.

Mutual account.

A mutual account is one in which there must be reciprocal demands and charges by each party against the other, like accounts between merchants. If the demand is only on one side, the account is not mutual. *Hoover Commercial Co. v. Humphrey*, 810.

ACTIONS—RIGHT AND CAUSE.

1. *Carriers. Carrying passengers beyond station. Punitive damages.*

Where plaintiff's cause of action is predicated solely upon the negligence of a railroad company in carrying her beyond her station, and not upon any insult offered her by the conductor and the evidence shows that the failure to stop at her station was not the result of willful or wanton negligence, punitive damages should not be awarded. *Lynchard v. Y. & M. V. R. Co.*, 46.

2. *Sheriffs and constables. Negligent shooting. Action on bond.*

A sheriff and the sureties on his official bond are liable in a civil action for damages arising from the intentional or negligent shooting of a misdemeanant who flees to avoid arrest. *Johnson v. Cunningham*, 140.

3. *Mode of making arrest. Care required.*

An officer arresting a fugitive misdemeanant owes to him the duty to exercise care and precaution not to injure him; nor must he discharge a firearm while in pursuit, in such a manner as to cause such fugitive injury. *Ib.*

4. *Eminent domain. Judgment. Suit in equity.*

A suit by a railroad company to restrain a telegraph company which has condemned a right of way for a telegraph line from taking possession of the right of way or erecting wires thereon is not maintainable on the theory that the telegraph company may not, under the judgment, take any part of the right of way to maintain an existing line, and should the telegraph company seek to use the judgment for an existing, instead of a new line, its right to do so may then be determined in a proceeding brought for that purpose. *Tel. Co. v. Railroad Co.*, 626.

ACTS CITED—ADMINISTRATORS OF ESTATES.

ACTION—RIGHT AND CAUSE—Continued.

5. *Sales. Warranties. Construction. Parties liable.*
Where a bank at different times took assignments of drafts with bills of lading attached for two different automobiles, sold to the same buyer by the same seller, the bank was a co-warrantor in both transactions and the amount received by it upon the second draft could be attached by the purchaser in an action to recover for breach of warranty in the sale of the first car. *Auto Co. v. Sturges*, 848.

ACTS CITED AND CONSTRUED.

1908. Intoxicating liquors. Offenses. "Keep for sale." *Collins v. State*, 619.

1910. Taxation. Sale of lands. Statutes. Retrospective effect. Construction. *Lewis v. Lyon Co.*, 763.

ADMINISTRATORS OF ESTATES.

1. *Acquisition of title by executors.*
The executor of an estate who has not been discharged has such a fiduciary relation to a life tenant and her interest in the land devised as prevents him from acquiring a tax title thereto, so as to defeat her title or that of the remainderman. *Leanes v. Whitfield*, 273.

2. *Premium on bond. Allowance.*
A premium paid by an administratrix *de bonis non*, on a special bond executed by her in order to collect the money for which land had been sold by her predecessor, by order of the court, should be allowed, where such bond was not only necessary but had been approved by the court. *Davis v. Blumenberg*, 432.

3. *Accounting. Valuation by appraisers.*
An administratrix on accounting, is chargeable for the actual value of property which has come into her hands, rather than for a less value fixed by the appraisers. *Ib.*

4. *Partnership debts.*
An administrator should be allowed credit for the payment of debts due by a firm of which deceased was a member, where it appears that the assets of the firm, upon the death of deceased, were turned over to his administrator and that the payments were made out of the proceeds thereof. *Ib.*

See WILLS.

ADMISSIBILITY OF EVIDENCE.

See EVIDENCE.

ADOPTION.

1. *Proceedings. Decree. Rev. Code* 1871, *section* 525.
Where a petitioner proceeding under Revised Code 1871, section 525, which provides that the prayer of a petition for adoption may be granted in whole or in part, filed a petition alleging that the adopting parent intended to make the child his sole heir, but the prayer of the petition did not contain such a provision, and the order of adoption followed the prayer and provided only that the child be adopted, and that the name be changed, in such case the judgment did not vest in the child the right of heirship in the estate of the adopting parent. *Leonard v. Lumber Co.*, 345.

2. *Rights of adopted children. Judgment. Conclusiveness.*
Under Code 1906, section 542, providing, that an adopted child shall be entitled to all the benefits proposed by the petitioner to be granted and conferred in the petition for adoption, an adopted child cannot take property by descent from its adopting parents unless such right is specifically given to it in the petition for adoption and in the decree of the court in response to it. *Fisher v. Browning*, 729.

3. *What law governs. Comity.*
Under the laws of comity the courts of Mississippi are not bound to recognize the rights flowing from the statute created by adoption in Kentucky if its laws on the subject of adoption and the rights flowing from it are inconsistent with our own law on that subject. *Ib.*

AGENCY.

1. *Action against surety. Evidence.*
The exclusion of evidence as to expenditures while the principal was absent was error. *First Baptist Church v. Hendricks*, 267.

2. *Carriers. Carriage of goods. Loading facilities.*
Where a common carrier of logs gave another the exclusive privilege to load logs at all points on its line, such third person became thereby the carrier's agent, and the carrier is liable to a shipper of logs for the loader's failure to promptly load his logs. *Railroad Co. v. Crawford*, 355.

AGENCY—Continued.

3. *Carriage of goods.*

A railroad cannot hold itself out as a common carrier of logs, and refuse the shipper the right to load his own logs and escape the responsibility of a wrongful performance of duty by an agency employed by it to discharge this function. It must either provide for loading logs itself, or it must allow the shipper to load them, and furnish the facilities for that purpose and this objection is not affected in any way by the fact that the railroad company has published its tariff according to law, or that it was necessary for the plaintiff as a condition to maintaining his action to go before either the Mississippi Railroad Commission or the Interstate Commerce Commission to correct his grievance. Railroad Co. v. Crawford, 355.

See CONTRACTS; RECOVERY.

AGREEMENTS.

1. *Corporations. Insolvency. Preference to creditors. Giving security.*

Where a corporation owning land mortgaged to a bank, conveyed it to a director, who gave a new mortgage thereon, the proceeds of which were paid to the bank, which released its mortgage, in order that the new mortgage might be a first lien, it being agreed that a second mortgage should be made for the balance of the original debt, and the second mortgage was not given, but to carry the debt temporarily, the corporation gave its note endorsed by the directors, and the land was later sold, the purchaser assuming the senior mortgage and giving purchase money notes for the balance, which notes were pledged as security for the corporation note held by the bank; such pledges were not fraudulent as an attempt, while insolvent, to prefer the bank as a creditor of the corporation or to relieve its directors of liability, but was merely a substantial performance of the agreement to give a second mortgage. *Price & Co. v. Rouse Bros. & Smith*, 785.

2. *Deeds. Agreement to support grantor.*

Failure to furnish support in accordance with a promise, which becomes the consideration for a deed absolute in form is not sufficient to support a suit for its cancellation. *Lee v. McMorries*, 889.

ALLEGATIONS.

Sheriffs and constables. Action on bond. Killing fugitive misdemeanant. Plea. "At." "Towards."

Where a declaration in an action against a sheriff and his bondsmen for the killing of a misdemeanant in attempting to effect

ALLEGATIONS—Continued.

his arrest, alleged that the sheriff failed to faithfully perform the duties of his office and disregarding such duties in his attempt to arrest "J" for the offense of disturbing public worship, did negligently and unjustifiably fire his pistol "at" and "towards" the said "J" as that the ball struck and killed him. In such case the gravamen of the cause of action was the sheriff's negligence in making the arrest, whereby deceased lost his life, the word "at" meaning "near, about, under, over, toward," and the word "toward" "in the direction of" and were therefore not effective to narrow the charge to an allegation that the sheriff pointed and aimed his pistol directly at deceased when it was fired. *Johnson v. Cunningham*, 140.

AMENDMENTS.

Appeal. New parties. Substitution.

Code 1906, section 775, authorizing amendments so as to bring the merits of the controversy between the parties fairly to trial, does not empower the circuit court, on an appeal from a justice of the peace court, to allow the plaintiff to amend her complaint by striking out her own name as plaintiff and substituting her husband in her stead. *Railroad Co. v. Maples*, 720.

APPEARANCE.

Waiver of objection.

Where in an action against two foreign corporations, their attorney entered into a written agreement with plaintiff's attorney agreeing that the two companies would appear in the case without further process and continued; "It is however expressly understood that this agreement is merly to facilitate the progress of the case and defendants are not to be understood thereby as waiving any of their defenses, or as waiving their right to object to the jurisdiction of this court to entertain this suit because of their nonresidence." Such an agreement was a waiver of process and an entering of appearance by the corporations. *Standard Oil Co. v. State*, 377.

APPEAL AND ERROR.

1. *Admission of evidence. Harmless.*

In a suit for personal injury by a minor, it was error to admit evidence that he was employed by defendant without the consent of his father, there being no averment in the declaration

APPEAL AND ERROR

APPEAL AND ERROR—Continued.

to support such testimony, but for this error alone the court on appeal would not reverse the case. *Newman Lumber Co. v. Dantzler*, 31.

2. *Record.*

Where the record on appeal does not disclose that the circuit judge made statements to the jury attributed to him in the assignment of errors the supreme court will not consider such assignment. *Akroyd v. State*, 51.

3. *Justice of the peace. Appeal. Dismissal. Justice's failure to approve bond.*

Where an appeal bond from a judgment of a justice of the peace was filed within the time required by law, and the justice stated that the bond was satisfactory, but failed to write his approval thereon and delivered the bond with the other papers in the case to the circuit clerk, it was reversible error to dismiss the appeal, because of the failure of the justice to write his approval on the bond. *Bowles v. Stave Co.*, 289.

4. *Connecting carriers. Evidence.*

Where goods shipped over connecting lines were shown to have been delivered to the consignee in a damaged condition, it was error to exclude evidence that they were in good condition when delivered to the initial carrier, on the theory that delivery to the carrier was thereby assumed "without proof having been made," such delivery having been shown by the bill of lading. *Jordan v. Railroad Co.*, 323.

5. *Board of supervisors. Appeal from decisions. Limitation.*

Where appellant had lost by limitation the right of appeal to the circuit court, from an order of the board of supervisors, they could not by again going before the board with practically the same petition and for the same purpose, and having entered again the former judgment, the right of appeal from which had been lost by limitation, obtain again a right of appeal. *Robinson v. Itawamba County*, 352.

6. *Appeal. Decisions reviewable. Academic question.*

The supreme court will not consider or decide purely academic or abstract questions of law in cases appealed by the state after acquittal. *State v. Jones*, 462.

7. *Instructions. Oral instructions.*

It is reversible error for the trial court to orally instruct the jury as to the verdict they were authorized to render. *Simmons v. State*, 463.

APPEAL AND ERROR

APPEAL AND ERROR—Continued.

8. *Juries. Irregularities. Harmless errors.*
Where there is no evidence that accused was not tried by a fair and impartial jury, error cannot be predicated upon irregularity in the drawing or impaneling thereof since Code 1906, section 2692, in relation to impaneling juries is declared by section 2718, Code 1906, to be merely directory. *Ferguson v. State*, 559.

9. *Evidence. Prejudice.*
In a trial for murder it was not reversible error to admit the testimony of a witness, in reference to the angle at which certain bullets entered into a post or wall in the room in which the killing occurred, where such testimony was immaterial, and the question of accused's guilt was not dependent upon the direction or angle of the bullets, but upon the question as to whether he or some other person fired the fatal shot. *Le Barron v. State*, 663.

10. *Ruling on evidence. Photographs.*
Where a photograph of a part of the house in which the killing occurred was excluded by the trial court, but was not sent up as an exhibit on appeal for the inspection of the supreme court, its exclusion cannot be reviewed. *Ib.*

11. *Trial. Instructions. Assault and battery. Prosecution.*
In a prosecution for assault and battery, it was error to give an instruction for the state that "if the jury believed from the evidence beyond a reasonable doubt that the defendant provoked the difficulty with an insult, although prosecutor struck the first blow, then you should find the defendant guilty, provided you believe that the defendant struck prosecutor with his fist, and threw him to the ground," because it takes away from the jury the right to determine whether such words were or were not a sufficient excuse or justification for the assault and battery made by prosecutor upon defendant, under Code 1906, section 1501. *Wicker v. State*, 690.

12. *Assault and battery. Instructions.*
In a prosecution for assault and battery it was error for the court not to grant to the defendant an instruction asked for by him "that insulting words do not constitute an assault, and if the jury believe from the evidence beyond a reasonable doubt that the prosecutor struck the defendant the first blow, and afterwards defendant defended himself with no more force than was necessary to ward off the attack, as he had a legal right to do, then the jury must find the defendant not guilty. *Ib.*

APPEAL AND ERROR—Continued.

13. *Acquiescence in decree by appellant. Acts constituting.*
Where complainant appealed without *supersedeas* from a decree, directing a sale of land to pay the amount due to a defendant and to apply the balance to complainant's claim, purchased the land for his own protection at the commissioners' sale, which sale was ordered by the defendant pending the appeal, by such purchase complainant did not acquiesce in the decree, and did not release the errors relied on in his appeal. *Bank of Canton v. Hesdorffer*, 709.

See PRACTICE AND PROCEDURE; WITNESSES.

ASSESSMENTS.

1. *Taxation. Duty of board of supervisors.*
It is the duty of the board of supervisors to see that all changes in assessments for taxes are entered on the roll. *Covington County v. Lumber Co.*, 368.

2. *Taxation. Authority to make assessment.*
The power to assess property for taxation and to levy and collect taxes is conferred, not by the common law, but by statute, and when so conferred can be exercised only in the manner pointed out by the statute and by the person or persons upon whom the power is therein conferred. *Mississippi R. Commission v. Tel. Co.*, 442.

3. *Railroad commission. Back assessment. Validity.*
Under Code 1906, section 4741, the power is conferred upon the railroad commission to assess property which has escaped taxation for previous years only, when notified so to do by the revenue agent; and hence an assessment made at the request of the attorney-general is void. *Ib.*

ASSUMPTION OF RISKS.

Master and servant. Injury to servant.
In a suit for personal injury caused by defective machinery, where it was the duty of plaintiff, when anything wrong in the machinery developed, to notify another employee who was employed by the master to make needed repairs, and plaintiff attempted to pull a raveled strip off the belt operating the machinery, without disconnecting the machinery, and was injured thereby, it was a voluntarily assumed risk which was obvious, and in such case he cannot recover. *Newman Lumber Co. v. Dantzler*, 31.

ATTORNEY AND CLIENT—BANKS AND BANKING.

ATTORNEY AND CLIENT.

Contract. Settlement of lawsuit.

A contract between attorney and client, whereby the client binds himself not to compromise or settle a pending or prospective lawsuit, is unenforceable. *Cochran v. Henry*, 233.

AVERMENTS.

1. *Admission of evidence. Harmless.*

In a suit for personal injury by a minor, it was error to admit evidence that he was employed by defendant without the consent of his father, there being no averment in the declaration to support such testimony, but for this error alone the court on appeal would not reverse the case. *Newman Lumber Co. v. Dantzler*, 31.

2. *Sheriffs and constables. Action on bond. Killing fugitive misdemeanant. "At." "Towards."*

Where a declaration in an action against a sheriff and his bondsmen for the killing of a misdemeanant in attempting to effect his arrest, alleged that the sheriff failed to faithfully perform the duties of his office and disregarding such duties in his attempt to arrest "J" for the offense of disturbing public worship, did negligently and unjustifiably fire his pistol "at" and "towards" the said "J" as that the ball struck and killed him. In such case the gravamen of the cause of action was the sheriff's negligence in making the arrest, whereby deceased lost his life, the word "at" meaning "near, about, under, over, toward," and the word "toward" "in the direction of" and were therefore not effective to narrow the charge to an allegation that the sheriff pointed and aimed his pistol directly at deceased when it was fired. *Johnson v. Cunningham*, 140.

BANKRUPTCY.

Property of bankrupt. Failure to schedule. Discharge.

Property belonging to the estate of a bankrupt, though not scheduled, will pass to the trustee upon adjudication of bankruptcy, and does not revest in the bankrupt by his discharge. *Jones v. Barnes*, 800.

BANKS AND BANKING.

1. *Action against directors. Demand on receiver.*

A declaration which avers that plaintiff was a depositor of a bank and that defendants were directors of said bank and wilfully

BANKS AND BANKING—Continued.

and negligently failed to perform their duties as directors and failed, neglected and refused to supervise the business of the bank, and that because of the directors' negligent failure and refusal to perform their duties, the bank had become insolvent and a receiver had been appointed to wind up its affairs and in consequence, plaintiff lost his claim against the bank, is demurrable because it does not allege that the receiver of the bank had been requested to bring suit and had refused to do so. *Hardin v. McKnight*, 73.

2. *Criminal offenses. Receiving deposits after insolvency.*

Where pending a decision of the board of directors to liquidate the bank because of its financial condition, the cashier received all deposits offered, but kept the same separate from the funds of the bank by pinning the money received from each depositor to the deposit slip and placing the same in a box, and after the appointment of a receiver, the identical money was returned to each depositor with a single exception, and where the failure of that depositor to call for and receive his deposit was the result of his failure to receive a notice to call at the bank and receive his deposit, in such case the cashier did not receive any deposit in violation of the statute. *Sively v. State*, 118.

3. *Receiving deposits.*

It is not admissible in order to show the insolvency of the bank, in a prosecution of a bank cashier for receiving a deposit after he knew or had good reasons to believe the bank insolvent, to introduce the record of a judgment against the bank, from which an appeal has been taken and is still pending. *McConnico v. State*, 265.

4. *Corporation. Loans. Misuse by borrowing corporation. Liability of officers.*

Where a bank loaned money to a corporation, knowing that the money was to be used for a purpose not authorized by the charter of the corporation, this does not in the absence of fraud on the part of the bank, render it liable to a stockholder of the corporation for loss resulting from the misuse of such funds. *Beckett v. Warehouse Co.*, 305.

5. *Ownership of stock. Transfer. Conversion.*

Under Code 1906, section 5005, providing that no corporation shall purchase or own the capital stock, or any part thereof, of any other corporation, if such other corporation be engaged in the same kind of business and be a competitor therein, and that any

BANKS AND BANKING—Continued.

corporation offending against this provision shall forfeit its charter if a domestic corporation, and if a foreign corporation shall forfeit its right to do business in the state, a bank is prohibited from accepting a transfer of stock in another bank, with which it was in competition, in payment of the indebtedness of a customer; and such transfer being illegal, the transferee, could not recover against the bank whose stock was so transferred for conversion thereof in refusing to transfer the same on its books to the transferee bank. *Bank v. Bank*, 852.

See AGREEMENTS; DEPOSITARIES.

BENEFICIARIES.

1. *Insurance. Children.*
Where the member surrendered a policy naming her husband as beneficiary, and procured a new policy to be issued naming her illegitimate child as the beneficiary, it was entitled to the benefit. *Shelton v. Minnis*, 133.

2. *Mutual benefit insurance. By-laws.*
In determining who is entitled to receive the benefits of mutual benefit associations wherein the money contributed by its members provides the funds from which the benefits are paid, a liberal construction to the by-law of the association so as to effect the purpose of the parties to the contract should be given. *Ib.*

BILLS AND NOTES.

1. *Action by indorsee. Right of recovery. Defenses. Bona fide purchasers.*
Where a purchaser of land gave his note for the purchase price under a contract providing that when the purchase price was paid in full the vendor should execute a full warranty deed to the purchaser, it was not necessary for the *bona fide* endorsee of said notes to tender a deed in order to obtain judgment on the same. *Funding Corporation v. Pennington*, 10.

2. *Defenses. Bona fide purchaser. Burden of proof.*
In a suit on such notes by the indorsee the burden of proof was on the maker to establish that he has equities or defenses to the notes and that the endorsee has due notice thereof. *Ib.*

3. *Sales. Agreements constituting. Validity.*
Where plaintiffs furnished the money to defendant with which to purchase a mule and took defendant's note for the amount of

BILLS AND NOTES—Continued.

the loan with interest, the note reciting that the title to the mule remained in the plaintiffs until the note was paid, the mule was the property of the plaintiffs and they were entitled to take possession of it upon default in the payment of the note. *Burkhalter v. Mitchell*, 92.

4. *Corporations. Actions. Pleading.*

In a suit on a promissory note for the purchase price of corporate stock, where the plea of the maker of the note sets up a breach by the payee, a bank, of its agreement to furnish the corporation with sufficient capital to carry on business, and that because of such breach the stock becomes worthless, it was not material for the plea to deny the reception of the money represented by the note, by the maker. *Bank v. Smith*, 105.

BILL OF EXCEPTIONS.

Presentation for review.

Where exceptions filed to the account of an administratrix *de bonis non*, present a question of fact and not simply one of law, the party presenting the exceptions to the supreme court for review should set forth in his brief each exception upon which the opinion of the court is desired, followed by a brief statement of the reason why the exception should be sustained or overruled and a citation to the pages of the record containing the evidence relative to the item excepted to. *Davis v. Blumenberg*, 432.

BILL OF PARTICULARS.

See EJECTMENT.

BOARDS OF SUPERVISORS.

Arguments. Minutes.

A board of supervisors cannot be bound by agreements made by individual members of the board, but can bind itself only by an order entered upon its minutes after a legal session. *Sawmill Co. v. Douglas*, 673.

BREACH OF WARRANTY.

Sales. Remedies of buyer.

Where a purchaser of a car is not required to pay the purchase price before delivery, he may in case of breach of warranty,

BREACH OF WARRANTY—Continued.

either reject the car and enter suit for damages, for breach of contract, or pay the price, take the car and recover the difference between its value in the condition received and the value of the car required by the contract. *Auto Co. v. Sturges*, 848.

BUYER AND SELLER.

Sales. Remedies of buyer.

Where the buyer of an automobile, sold it after notifying the original seller of a breach of warranty, and took in part payment another car, this did not preclude his right to recover for the breach of warranty since the value of the car taken in payment could be determined, and the amount received by the original buyer for the defective car thereby ascertained. *Auto Co. v. Sturges*, 848.

CARRIERS.

1. *Bills of lading. Interstate commerce. Code* 1906, *section* 4851.

Since the adoption by Congress of the Carmack amendment the Interstate Commerce Act of Febrary 4, 1887 (Act June 20, 1906, chapter 3591, section 7, 34 Stat. 393, U. S. Comp. St. Supp. 1911, page 1307), covering the subject of bills of lading for interstate shipments, section 4851 of Code 1906, making bills of lading conclusive in the hands of *bona fide* holders for value, against the person or corporation issuing them, that the property described therein was received by the carrier, has no application to interstate shipments of freight. *So. Ry. Co. v. State Cotton Co.*, 71.

2. *Connecting carriers. Injury to goods.*

The rule that a connecting carrier, delivering goods in a damaged condition which it received from the initial carrier in good condition is liable therefor, unless it shows that the injury was not its fault, is not in conflict with Code 1906, section 4853, providing that if such a carrier fails to furnish certain records it shall be presumed to have caused the damage, since the statute merely makes a conclusive presumption under such circumstances, instead of a *prima facie* one. *Jordan v. Railroad Co.*, 323.

3. *Evidence. Best and secondary.*

Under Laws 1908, chapter 196, providing for the recovery of a penalty if the carrier failed to settle a claim after sixty days' written notice, such written notice is the best evidence and evidence of its contents in the absence of proof of its loss or failure to produce after notice, is not admissible. *Ib.*

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CARMACK AMENDMENT—CLAIMS AND COUNTERCLAIMS

CARRIERS—Continued.

4. *Carriage of goods. Loading privileges and facilities.*
There is no legal obligation resting upon railroads as common carriers to furnish their cars, engines, and crews to individuals carrying on a log loading business, or to receive logs to be loaded on its cars along the right of way between stations. *Railroad Co. v. Crawford*, 355.

See DAMAGES; PASSENGERS.

CARMACK AMENDMENT.

See HEPBURN ACT.

CAVEAT EMPTOR.

Life estate. Sales. Rights of purchaser. Improvements.
One who purchases land from the tenant for life, who held under a will of record in the county in which the land was situated at that time, was chargeable with notice that he purchased from a life tenant and could not recover from the remainderman for improvements placed on the land, although before his purchase the land had been included in a new county and there was no record of the will in such new county. *Deanes v. Whitfield*, 273.

CITY OF CORINTH.

Municipal corporations. Ordinances. Enactment. Code 1906, *section* 3404.
Under Code of 1906, section 3404, providing that the chapter on municipalities shall not apply to any existing municipality to which the law did not apply in 1892, unless adopted by a vote of the electors, the general municipal statute relating to the passage of ordinances does not apply to the city of Corinth, which under its charter (Acts 1884, chapter 403), was given special authority to enact ordinances. *City of Corinth v. Sharp*, 696.

See MUNICIPAL CORPORATIONS.

CLAIMS AND COUNTERCLAIMS.

1. *County warrants. Payment. Interest.*
Where a claim against a county has been allowed and a warrant issued therefor which has been legally registered, it should be paid in the order of its registration without interest. *Sunflower Co. v. McClurg Bros. Co.*, 15.

CLAIMS AND COUNTERCLAIMS—Continued.

2. *Witnesses. Code* 1906, *section* 1917. *Disqualification. Estate of deceased.*

The rule of evidence as contained in section 1917, Code 1906, providing that "a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person which originated during the lifetime of such person," applies only to the person who has a claim or defense against the estate of a deceased person, it does not apply to the wife of such person. *Spivey v. Walton*, 56.

3. *Set-off. Necessity of pleading.*

Where in a suit on a contract, defendant plead that the contract was one of the kind commonly called "futures," and claimed a set-off for money paid thereunder, and the replication simply denied the indebtedness, and made no reference or claim to money paid under the contract by plaintiff to defendant and plaintiff filed no pleading in the nature of a set-off or counterclaim, the amount paid under the contract by plaintiff to defendant could not be credited on the amount of defendant's counterclaim. *Weld v. Austin*, 279.

4. *Claims against estate. Sufficiency of affidavit.*

Where the affidavit to a claim in favor of a partnership is probated against an estate, the fact that such affidavit fails to show that the affiant is a member of the firm, does not render the payment of the claim improper, if such affiant is in fact a member of the firm. *Davis v. Blumenberg*, 432.

5. *Claim against estate. Allowance. Sufficiency of certificate.*

Where the certificate of the clerk to claims probated against an estate, was not in the language of section 2106, Code 1906, in that it omitted the word "probated," this did not invalidate it, where in all other respects the statute had been complied with by the person presenting the claim; the word "probated," means merely that the claim has in the judgment of the clerk been proven in the manner required by law, and the omission being immaterial, since the fact that the clerk has allowed and registered the claim shows that he decided that it had been proven. *Ib.*

6. *Claims based on denial of plaintiff's right. Mutuality of claims.*

Code of 1906, section 745, providing that, where a mutual indebtedness exists between plaintiff and defendant, defendant may plead and set-off against the demand of plaintiff any debt which he may have against plaintiff, contemplates a mutual indebtedness between the parties. This implies that there was a dealing

CODE 1871—CODE 1906.

CLAIMS AND COUNTERCLAIMS—Continued.

together between them, so that each became indebted to the other. "Mutual" means reciprocally acting, giving, receiving, interchanging, so that a claim of set-off based upon a total denial of plaintiff's right of action cannot be pleaded. *Hoover Commercial Co. v. Humphrey*, 810.

7. *Presentation to board of supervisors.*

Under section 311, Code of 1906, all claims against a county, whether based upon torts or contracts, whether the damages claimed are liquidated or unliquidated, must first be presented to the board of supervisors before the claimant can appeal to the courts. The county must have official notice of the claim and a chance to adjust the same. *Davis v. Lamar County*, 827.

CODE 1871.

§ 525. Adoption. Proceedings. Decree. *Leonard v. Lumber Co.*, 345.

CODE 1906.

§ 80. Schools and school districts. Separate districts. Review of decision. *Hathorn v. Town of Woodville*, 589.

§ 120. Judges. Disqualification. Constitution 1890, section 165. *Dodd v. Kelly*, 471.

§ 214. Criminal law. Second offense. Punishment. *Gaston v. State*, 484.

§ 311. Counties. Claims. Presentation to board of supervisors. Statute. Construction. *Davis v. Lamar County*, 827.

§ 598. Equity. Pleading. Multifariousness. *N. O. & N. E. R. Co. v. N. O. G. N. R. Co.*, 453.

§ 745. Set-off and counterclaim. Claims based on denial of plaintiff's right. Mutuality of claims. Appeal and error. Harmless error. Submission of issues. *Hoover Commercial Co. v. Humphrey*, 810.

§ 772. Interpleader. Effect. *McAlister Bros. & Co. v. Sanders*, 283.

§ 775. Justice of the peace. Appeal. New parties. Substitution. Amendments. *Railroad Co. v. Maples*, 720.

§ 819. Judgment. Lien. Property covered. Debts. *Bryan v. Hardware Co.*, 255.

§ 924. Corporation. Liability of directors. Debts exceeding capital stock. Courts. Terms of court. Civil terms. Laws 1910, ch. 105. *Mann's Mercantile Co. v. Smith*, 16.

CODE 1906.

CODE 1906—Continued.

§ 929. Eminent domain. Right to exercise. Telegraph companies. *Tel. Co. v. Railroad Co.*, 627.

§ 1006. Eminent domain. Statutory proceedings, compliance. Construction of statutes. *Tel. Co. v. Railroad Co.*, 626.

§ 1079. Kidnapping. Nature of offense. *State v. Powe*, 770.

§ 1501. Criminal law. Trial. Instructions. Assault and battery. Prosecution. *Wicker v. State*, 690.

§ 1655. Insurance. Mutual benefit insurance. Children. *Shelton v. Minnis*, 133.

§ 1746. Intoxicating liquors. Offenses. "Keep for sale." *Collins v. State*, 619.

§ 1771. Intoxicating liquor. Offenses. Place. Laws 1908, chapter 115. *State v. Owen*, 565.

§ 1827. Pleading. Bill of particulars. *Mitchell v. Tubb*, 221.

§ 1848. Life estates. Improvements. Right to compensation. *Deanes v. Whitfield*, 273.

§ 1917. Witnesses. Disqualification. Estate of deceased. *Spivey v. Walton*, 56.

§ 1983. Taxation. Sale of land. Presumptions. Prima facie evidence. Pleading. Bill of particulars. *Mitchell v. Tubb*, 221.

§ 2106. Claim against estate. Allowance. Sufficiency of certificate. *Davis v. Blumenberg*, 432.

§ 2303. Gaming. Gambling contracts. Dealing in futures. Recovery of payments. Pleading. Necessity of pleading set-off. *Weld v. Austin*, 279.

§ 2606. Insurance. Service of process on foreign corporation. Proof of appointment of attorney in fact. Evidence. Appointment of agent. Judgment. Default. Sufficiency of record recitals. *Fire Ins. Co. v. Sayle*, 169.

§ 2629. Jury. Selection. Drawing jurors for trial. Code 1906, section 2629. Irregularities. Harmless error. *Ferguson v. State*, 559.

§ 2692. Summons and impaneling juries. *Ferguson v. State*, 559.

§ 2788. Bona fide purchaser. Recordation of deed. *Dedeaux v. Cuevas*, 7.

§ 3004. Municipal corporations. Organization. Applicability. Ordinances. Enactment. Constitution 1890, sections 53-71. Validity. Proof of passage. *City of Corinth v. Sharp*, 696.

§ 3114. Limitation of Actions. Applicability. *N. O. G. N. R. R. Co. v. Fortenberry*, 79.

§ 3521. Partition. Right of parties. Partition of land and standing timber. *Product & Mfg. Co. v. Buckley*, 897.

§ 3589. Criminal law. Judicial notice. *Montgomery v. State*, 518.

CONDITIONAL BEQUESTS—CONFESSIONS.

CODE 1906—Continued.

§ 3910. Licenses. Privilege tax. Penalty for non-payment. Statutory provisions. *Bennett v. Jones*, 880.

§ 3946. Appearance. Jurisdiction acquired. Special appearance. *Standard Oil Co. v. State*, 377.

§ 4054. Carriers. Carriage of passengers. Who are "passengers." *Railroad Co. v. Winn*, 755.

§ 4067. Railroads. Mortgages. Liabilities secured. Scope of relief. *N. O. M. & C. R. Co. v. Carter*, 1.

§§ 4293-4298-4307. Taxation. Assessment. Duty of board of supervisors. Change of valuation. Power of board of supervisors. *Covington County v. Lumber Co.*, 368.

§ 4412. Streets. Law of the road. Standing teams. *Palotta v. Light & Traction Co.*, 61.

§§ 4497, 4522, 4556, 4557, 4560. Forgery. Instruments subject to forgery. Report of public school. *Moore v. State*, 181.

§ 4741. Taxation. Railroad commission. Back assessment. Validity. *Mississippi R. Commission v. Tel. Co.*, 442.

§ 4851. Carriers. Bills of lading. Interstate commerce. *So. Ry. Co. v. State Cotton Co.*, 71.

§§ 4853. Carriers. Carriage of goods. Connecting carriers. Injury to goods. Actions. Evidence. Laws 1908, chapter 196. Best and secondary evidence. Notices. Loss of primary evidence. Clerks of courts. Compensation. Forfeiture of fees. *Jordan v. Railroad Co.*, 323.

§ 5005. Bank and banking. Ownership of stock. Transfer. Conversion. *Bank v. Bank*, 852.

CONDITIONAL BEQUESTS.

See WILLS.

CONFESSIONS.

Criminal law. Evidence. Voluntary. Admissibility. Preliminary evidence. Threats.

A voluntary confession is one proceeding from the spontaneous operation of the party's own mind, free from the influence of any extraneous disturbing cause. A confession was not voluntary which was obtained from a defendant who was sick and in jail and in fear of lynching by a newspaper reporter who told the defendant he would have no peace or hope of salvation unless he confessed, that he, the reporter, was a "Spiritualist" and could look into the defendant's heart, and see the crime which he had committed. *Johnson v. State*, 196.

CONSTITUTION 1890—CONSTITUTIONAL LAW.

CONSTITUTION 1890.

§ 26. Prison. Trustees. Violation of duty. Indictment. Sufficiency. *Montgomery v. State*, 518.

§§ 53-71. Municipal corporations. Organization. Code 1906, section 3404. Applicability. Ordinances. Enactment. Validity. Proof of passage. *City of Corinth v. Sharp*, 696.

§ 165. Judges. Disqualification. Code 1906, section 120. *Dodd v. Kelly*, 471.

CONSIDERATION.

Deeds. Cancellation. Agreement to support grantor.

Failure to furnish support in accordance with a promise, which becomes the consideration for a deed absolute in form is not sufficient to support a suit for its cancellation. *Lee v. McMorries*, 889.

See EVIDENCE.

CONSTITUTIONAL LAW.

1. *Judges. Disqualification.*

Under Constitution 1890, section 165, and Code 1906, section 120, so providing, a chancellor is disqualified from presiding in a case where he is connected by affinity or consanguinity with parties to the proceeding, without the consent of all parties, and this is true whether his decision be right or wrong. *Dodd v. Kelly*, 471.

2. *Commerce. Regulations. Powers of states. Shipment of liquors. Application of statutes. Power of congress.*

It is always the court's duty in passing upon the constitutionality of a statute to separate the valid from the invalid parts thereof, if this can be done, and to permit the valid parts to stand unless the different parts of the statute are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole and that if all could not be carried into effect it would not have enacted the residue independently. *American Express Co. v. Beer*, 528.

3. *Class legislation. Laws* 1912, *chapter* 171.

Laws of 1912, chapter 171, which provides for the organization of mutual insurance corporations, limits the amount of insurance to be taken on each risk; gives to all policy holders the right to vote for directors; requires that a majority of the directors shall be residents of this state; provides for dividends to be

CONSTITUTIONAL LAW—Continued.

paid to policy holders out of the earnings; for assessment of policy holders, whenever necessary to pay losses is not invalid as class legislation, as it applies to all companies doing a similar business. *Huggins v. Fire Ins. Co.*, 650.

4. *Municipal corporations. Ordinances. Constitution* 1890, *section* 53-71.

Constitution 1890, section 53-71, providing for the recording of the ayes and nayes on questions and requiring all bills to have titles does not apply to municipal ordinances but only to acts of the legislature. *City of Corinth v. Sharp*, 696.

5. *Licenses. Penalty for non-payment. Statutory provision.*

There is nothing in chapter 210 of the Law of 1910, which amends section 3899 and section 3905, and repeals sections 3897 and 3898 of the Code of 1906 in conflict with section 3901, nor is there anything in section 3901 violative of the constitution. *Bennett v. Jones*, 880.

CONTEMPT.

Divorce. Alimony. Issues.

Where a husband is cited for contempt in failing to comply with an order of the court requiring payment of alimony *pendente lite* and defended on the ground of financial inability to comply with the order, and the judgment against him for contempt recited that the chancellor was fully advised as to all matters and things pertaining to the proceeding, and being so advised, determined that defendant was in contempt, such a judgment necessarily found that he was able to comply with the decree. *Hamblin v. Hamblin*, 113.

CONTRACTS.

1. *Telegraphs and telephones. Delay in delivering. Damages.*

A failure to deliver a telegram which if delivered would not have constituted a contract, will not entitle the sendee to damages for failing to make such contract. *Postal Tel. Co. v. Criscoe*, 37.

2. *Conditional sales. Agreements constituting.*

Where plaintiffs furnished the money to defendant with which to purchase a mule and took defendant's note for the amount of the loan with interest, the note reciting that the title to the mule remained in the plaintiffs until the note was paid, the mule was the property of the plaintiffs and they were entitled to take

CONTRACTS—Continued.

possession of it upon default in the payment of the note. *Burkhalter v. Mitchell*, 92.

3. *Same.*

Contracts of this kind are enforced even against innocent purchasers for value without notice, where there is a *bona fide* and actual conditional sale. *Ib.*

4. *Parol evidence. Bills and notes. Defenses.*

In a suit on a promissory note where there are no contractual provisions in the note, relative to its consideration, parol evidence is admissible to show a failure of consideration. *Bank v Smith*, 105.

5. *Mutual benefit insurance. Beneficiaries. By-laws.*

In determining who is entitled to receive the benefits of mutual benefit associations wherein the money contributed by its members provides the funds from which the benefits are paid, a liberal construction to the by-law of the association so as to effect the purpose of the parties to the contract should be given *Shelton v. Minnis*, 133.

6. *Attorney and client. Contract. Settlement of lawsuit.*

A contract between attorney and client, whereby the client binds himself not to compromise or settle a pending or prospective lawsuit, is unenforceable. *Cochran v. Henry*, 233.

7. *Principal and surety. Liability of surety. Breach by principal Action against surety. Evidence.*

Where a written contract was made providing that the principal should personally superintend the construction of a building at a *per diem* rate, with authority to contract for labor and materials, subject to the approval of the building committee and to push the work to completion, without employing any assistant under which payment for wages were to be made to him weekly and the principal gave a bond conditioned to well and truly perform and complete such contract and to indemnify the committee against the expenditure of more than $6900, and after the principal had superintended a large part of the work and purchased most of the material, he left and placed an employee in charge, who continued the work under his instructions by letter and to this agreement the building committee though knowing of it, did not consent, supposing the absence of the principal was temporary and continued to make its checks for wages payable to the principal and the building, when completed, exceeded

[illegible]

[illegible] in such case the contract was breached and the [illegible] liable on their bond. *First Baptist Church* v. [illegible].

[illegible]. *Recovery of payments. Code* 1906, *section* 2303. [illegible] section 2303, so providing, contracts for the purchase [illegible] commodities for future delivery, the parties not intending an actual delivery, or contracts of the kind commonly [illegible] "futures" are not enforceable, and when plaintiff represented in buying and selling cotton for future delivery, [illegible] him a credit margin and some of the transactions [illegible] at a profit and others at a loss, payments being made [illegible] differences in price arising out of the rise and fall of [illegible] price above or below the contract price and the [illegible] showed that no actual delivery of the cotton was contemplated, and that the contract was of the kind commonly [illegible] "futures" such a contract is condemned by the statute and [illegible] be enforced in the courts. *Weld v. Austin*, 279.

[illegible]. *Evidence to vary written contract. Substitution of new [illegible] for [illegible]. Return of goods.*

[illegible] plaintiff and defendant entered into a five-year contract [illegible] for purchase of patterns by defendant from plaintiff, which [illegible] that two hundred and fifty dollars of the purchase price [illegible] patterns ordered at the date of the contract should remain [illegible] standing credit during the term of the contract, and that [illegible] should be paid thereon semiannually, it could not be [illegible] by parol evidence that plaintiff's agent stated that defendant would not be called upon to pay this sum, but that, at the [illegible] or discontinuance of the contract, patterns might be [illegible] in settlement thereof, since such evidence was simply [illegible] attempt to vary by parol the terms of a plain and unambiguous contract, nor was such evidence admissible as showing [illegible] the contract was induced by false representations. *McCall* [illegible] *Person, Etc., Co.*, 865.

[illegible]. *Provisions relative to return of goods.*

[illegible] a five-year contract for the purchase of patterns by defendant from plaintiff, providing that patterns reported by plaintiff as discarded might be returned and exchanged for other patterns and should be credited to a discard exchange account, [illegible] credit to continue for six months, and all patterns ordered [illegible] such period, excepting the monthly standing order, to [illegible] charged to such account unless the account was exhausted,

CONTRACTS—Continued.

where the purchaser on several occasions failed to order a sufficient number of new patterns within the six-months period to exhaust its credit for those returned, it was not entitled to have the balance credited to its regular monthly order or on its indebtedness on account of the initial order for patterns which was to be carried during the term of the contract, since the contract in express terms provided otherwise. *Ib.*

See NOVATION.

CORPORATIONS.

1. *Action against reorganized company. Liabilities.*

In a suit brought against a new corporation on the theory that it was simply a reorganization of an old corporation, which was liable to plaintiff, the agreed statement of facts was held by the court not to show that the new corporation was a reorganization of the original corporation and liable for its debts. *N. O. M. & C. R. Co. v. Carter*, 1.

2. *Liability of directors. Debts exceeding capital stock. Code* 1906, *section* 924. *Laws* 1910, *chapter* 105.

Under Code 1906, section 924, providing that the amount of debts which a trading corporation may contract shall not exceed the amount of its capital stock paid in, and in case the debts exceed that amount, the directors who contracted such debts shall be individually liable for the excess, the debts prohibited by this statute must be valid claims against the corporation, enforceable in the courts, and capable of being made a charge on the assets of the company. *Mann's Mercantile Co. v. Smith*, 16.

3. *Same.*

In order to make a director liable for such excess it must be shown that the director sought to be charged with liability assents to, or contracted the debt officially as a director, acting concurrently with a majority of the board. *Ib.*

4. *Liability of directors. Debts in excess of capital stock. Code* 1906, *section* 924.

Under section 924, Code 1906, making directors of corporations individually liable for debts of the corporation "contracted" by them in excess of the paid in capital stock of the corporation, in order to hold a director personally responsible, he must have been one of those directors, who concurrently acting as such and constituting a majority, consented to the debt. *Ib.*

CONTRACTS—Continued.

the fixed cost, in such case the contract was breached and the sureties were liable on their bond. *First Baptist Church v. Hendricks*, 267.

8. *Dealing in futures. Recovery of payments. Code* 1906, *section* 2303.
Under Code section 2303, so providing, contracts for the purchase or sale of commodities for future delivery, the parties not intending an actual delivery, or contracts of the kind commonly called "futures" are not enforceable, and when plaintiff represents defendant in buying and selling cotton for future delivery, and extended him a credit margin and some of the transactions were closed at a profit and others at a loss, payments being made of the differences in price arising out of the rise and fall of the market price above or below the contract price and the facts showed that no actual delivery of the cotton was contemplated, and that the contract was of the kind commonly called "futures" such a contract is condemned by the statute and will not be enforced in the courts. *Weld v. Austin*, 279.

9. *Parol evidence to vary written contract. Substitution of new debtor. Sales. Return of goods.*
Where plaintiff and defendant entered into a five-year contract for the purchase of patterns by defendant from plaintiff, which provided that two hundred and fifty dollars of the purchase price of patterns ordered at the date of the contract should remain as a standing credit during the term of the contract, and that interest should be paid thereon semiannually, it could not be shown by parol evidence that plaintiff's agent stated that defendant would not be called upon to pay this sum, but that, at the expiration or discontinuance of the contract, patterns might be returned in settlement thereof, since such evidence was simply an attempt to vary by parol the terms of a plain and unambiguous contract, nor was such evidence admissible as showing that the contract was induced by false representations. *McCall Co. v. Parson, Etc., Co.*, 865.

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CONSTITUTIONAL LAW—Continued.

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CONTRACTS.

CONTRACTS—Continued.

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6. *Attorney and client. Contract. Settlement of lawsuit.*

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7. *Principal and surety. Liability of surety. Breach by principal. Action against surety. Evidence.*

Where a written contract was made providing that the principal should personally superintend the construction of a building at a *per diem* rate, with authority to contract for labor and materials, subject to the approval of the building committee and to push the work to completion, without employing any assistant, under which payment for wages were to be made to him weekly, and the principal gave a bond conditioned to well and truly perform and complete such contract and to indemnify the committee against the expenditure of more than $6900, and after the principal had superintended a large part of the work and purchased most of the material, he left and placed an employee in charge, who continued the work under his instructions by letter, and to this agreement the building committee though knowing of it, did not consent, supposing the absence of the principal was temporary and continued to make its checks for wages payable to the principal and the building, when completed, exceeded

CONTRACTS.

CONTRACTS—Continued.

the fixed cost, in such case the contract was breached and the sureties were liable on their bond. *First Baptist Church v. Hendricks*, 267.

8. *Dealing in futures. Recovery of payments. Code* 1906, *section* 2303.
Under Code section 2303, so providing, contracts for the purchase or sale of commodities for future delivery, the parties not intending an actual delivery, or contracts of the kind commonly called "futures" are not enforceable, and when plaintiff represents defendant in buying and selling cotton for future delivery, and extended him a credit margin and some of the transactions were closed at a profit and others at a loss, payments being made of the differences in price arising out of the rise and fall of the market price above or below the contract price and the facts showed that no actual delivery of the cotton was contemplated, and that the contract was of the kind commonly called "futures" such a contract is condemned by the statute and will not be enforced in the courts. *Weld v. Austin*, 279.

9. *Parol evidence to vary written contract. Substitution of new debtor. Sales. Return of goods.*
Where plaintiff and defendant entered into a five-year contract for the purchase of patterns by defendant from plaintiff, which provided that two hundred and fifty dollars of the purchase price of patterns ordered at the date of the contract should remain as a standing credit during the term of the contract, and that interest should be paid thereon semiannually, it could not be shown by parol evidence that plaintiff's agent stated that defendant would not be called upon to pay this sum, but that, at the expiration or discontinuance of the contract, patterns might be returned in settlement thereof, since such evidence was simply an attempt to vary by parol the terms of a plain and unambiguous contract, nor was such evidence admissible as showing that the contract was induced by false representations. *McCall Co. v. Parson, Etc., Co.*, 865.

10. *Sales. Provisions relative to return of goods.*
Under a five-year contract for the purchase of patterns by defendant from plaintiff, providing that patterns reported by plaintiff as discarded might be returned and exchanged for other patterns and should be credited to a discard exchange account, the credit to continue for six months, and all patterns ordered within such period, excepting the monthly standing order, to be charged to such account unless the account was exhausted,

CORPORATIONS.

CONTRACTS—Continued.

where the purchaser on several occasions failed to order a sufficient number of new patterns within the six-months period to exhaust its credit for those returned, it was not entitled to have the balance credited to its regular monthly order or on its indebtedness on account of the initial order for patterns which was to be carried during the term of the contract, since the contract in express terms provided otherwise. *Ib.*

See NOVATION.

CORPORATIONS.

1. *Action against reorganized company. Liabilities.*
In a suit brought against a new corporation on the theory that it was simply a reorganization of an old corporation, which was liable to plaintiff, the agreed statement of facts was held by the court not to show that the new corporation was a reorganization of the original corporation and liable for its debts. *N. O. M. & C. R. Co. v. Carter*, 1.

2. *Liability of directors. Debts exceeding capital stock. Code* 1906, *section* 924. *Laws* 1910, *chapter* 105.
Under Code 1906, section 924, providing that the amount of debts which a trading corporation may contract shall not exceed the amount of its capital stock paid in, and in case the debts exceed that amount, the directors who contracted such debts shall be individually liable for the excess, the debts prohibited by this statute must be valid claims against the corporation, enforceable in the courts, and capable of being made a charge on the assets of the company. *Mann's Mercantile Co. v. Smith*, 16.

3. *Same.*
In order to make a director liable for such excess it must be shown that the director sought to be charged with liability assents to, or contracted the debt officially as a director, acting concurrently with a majority of the board. *Ib.*

4. *Liability of directors. Debts in excess of capital stock. Code* 1906, *section* 924.
Under section 924, Code 1906, making directors of corporations individually liable for debts of the corporation "contracted" by them in excess of the paid in capital stock of the corporation, in order to hold a director personally responsible, he must have been one of those directors, who concurrently acting as such and constituting a majority, consented to the debt. *Ib.*

CRIMINAL LAW.

CORPORATIONS—Continued.

5. *Actions by stockholders. Conditions precedent.*
A minority stockholder of a corporation need not apply, as he is ordinarily required to do, to the directors or to the stockholders for redress before bringing a suit for the recovery of money misused where the directors, who have used the funds of the corporation for a purpose not authorized by its charter, own or control the majority of the stock. *Beckett v. Warehouse Co.*, 305.

6. *Sale of stock. Return of consideration.*
Where complainant was induced by fraudulent representations to purchase the stock of a corporation, and sold the stock to a third party, receiving from him notes for the purchase price, which notes afterwards turned out to be worthless, such third party having become a bankrupt as did also the corporation, complainant on suing to set aside the transaction for fraud, was not required to return anything to defendants as there was in such case nothing to be returned. *Jones v. Barnes*, 800.

7. *Ownership of stock in other banks.*
Under Code 1906, section 5005, prohibiting the acquisition of stock by one of two competing corporations in the other, is a mere *ultra vires* act and of which the state only could complain. *Bank v. Bank*, 852.

8. *Bona fide purchaser without notice.*
A corporation accepting corporate stock in payment of a debt due it to the extent of the value of the stock is a purchaser for value to the same extent as if it had paid money. *Ib.*

See AGREEMENTS; FRAUD.

CRIMINAL LAW.

1. *Sheriffs and constables. Liability on bond. Mode of arrest. Discharge of firearms.*
A sheriff pursuing a fleeing misdemeanant who willfully and intentionally fires a modern pistol of high power in the direction of such fugitive and the bullet strikes and kills him, is guilty of a negligent, intentional and willful wrong for which he and his bondsmen are liable, whether he shot directly at the fugitive or the bullet struck a twig and glanced and struck deceased. *Johnson v. Cunningham*, 140.

CRIMINAL LAW.

CRIMINAL LAW—Continued.

2. *Intoxicating liquors. Offenses. Evidence.*
The proof of possession of liquors, without proof evidencing the purpose of selling or giving away the same in violation of law, is not sufficient for conviction. *Jackson v. State*, 153.

3. *New trial. Newly discovered evidence. Confession of another.*
Where a defendant convicted of crime made a motion for a new trial, on the ground of newly discovered evidence, and supported his motion by affidavits that another person had confessed that he committed the crime for which the defendant had been convicted and had pleaded guilty to the same, the motion should be sustained. *Roundtree v. State*, 166.

4. *Forgery. Elements. Instruments subject to forgery.*
In order that forgery may be committed, the writing alleged to have been forged must be one which, if genuine, might injure another. *Moore v. State*, 181.

5. *Evidence. Confession. Plea of nolo contendere.*
A plea of *nolo contendere* is only a limited confession of the charge and does not amount to a general confession of guilt and is not binding on the defendant in another prosecution even for the same offense, and cannot be introduced against him. *Chester v. State*, 459.

6. *Intoxicating liquors. Offenses. Defenses.*
Where a defendant at the request of another, to obtain him some whiskey, bought it from one selling in violation of law, he was guilty of acting as the agent of the purchaser and he cannot escape liability, by showing that he had been employed to obtain evidence against another unlawfully selling intoxicants, and had the assurance of a deputy sheriff before making the purchase, that he would incur no risk; since his offense was entirely unnecessary to obtain evidence against the seller and was entirely distinct from that of unlawful selling. *Brantley v. State*, 466.

7. *Second offense. Punishment. Code* 1906, *chapter* 214.
Where accused was tried for the unlawful sale of intoxicating liquors, as for a first offense, and the indictment did not charge a former conviction, he can only be punished as for a first offense under Laws 1912, chapter 214. *Gaston v. State*, 484.

8. *Trial. Instructions.*
An instruction for the state in a criminal case "that the jury do not have to believe a witness just because he testifies, and

DAMAGES.

CRIMINAL LAW—Continued.

may take into consideration his interest if any, and believe or disbelieve any witness as the jury may find the truth in all of the testimony," is erroneous under the facts of this case as singling out for attack the testimony of accused who took the stand. *Pigott v. State*, 552.

See INTOXICATING LIQUORS.

DAMAGES.

1. *Carrying passengers beyond station. Nominal damages.*

In a suit by a passenger against a railroad company for being carried beyond her station, where had she not been carried beyond her station, she would have reached her destination by either riding or walking one mile, accompanied by her brother, who would have carried her suit case; but by reason of being carried beyond, she was compelled to walk alone, in order to reach her destination two or two and one-half miles, carrying her suit case herself and by reason thereof was made sick and remained in bed for three or four days with fever, she was entitled to recover more than nominal damages. *Lynchard v. Y. & M. V. R. Co.*, 46.

2. *Carrying passengers beyond station. Punitive damages.*

Where plaintiff's cause of action is predicated solely upon the negligence of a railroad company in carrying her beyond her station, and not upon any insult offered her by the conductor and the evidence shows that the failure to stop at her station was not the result of willful or wanton negligence, punitive damages should not be awarded. *Ib.*

3. *Action for wrongful ejection. Exemplary damages.*

Where plaintiff owned a railroad mileage book and there was a stipulation on the back of the book under the heading "Instructions to Conductors" that, "Any ticket issued by an agent in exchange for coupons detached from the ticket will be honored only when presented in connection with this ticket. Holder must identify himself as the original purchaser of this ticket to your entire satisfaction." And a further stipulation that a passenger should exchange the mileage for a ticket, and in exchanging the mileage remaining in the book for a ticket, the book was retained by the ticket agent of defendant, who did not explain that its production with the ticket was necessary, and plaintiff had never before been called upon to produce the book and did

DEBTOR AND CREDITOR.

DAMAGES—Continued.

not know its production was necessary, and the train auditor refused to accept the ticket from plaintiff without the book, and ejected plaintiff from the train, although the facts were explained to him and plaintiff was identified to the satisfaction of the conductor. In such case the conduct of the auditor was arbitrary, willful, and oppressive, evincing an utter disregard of plaintiff's rights and made a proper case for the infliction of exemplary damages. *Williams v. So. Ry. Co.*, 99.

4. *Carriage of goods. Connecting carriers. Injury to goods.*
The rule that a connecting carrier, delivering goods in a damaged condition which it received from the initial carrier in good condition is liable therefor, unless it shows that the injury was not its fault, is not in conflict with Code 1906, section 4853, providing that if such a carrier fails to furnish certain records it shall be presumed to have caused the damage, since the statute merely makes a conclusive presumption under such circumstances, instead of a *prima facie* one. *Jordan v. Railroad*, 323.

5. *Telegraphs and telephones. Operation. Sufficiency of evidence.*
The measure of liability of a telegraph company for failure to transmit a message to plaintiff's father to meet a train with a rig, as plaintiff's child was sick, was properly limited to nominal damages, where it was not shown that the child's death was proximately caused thereby, on account of exposure in carrying her to his father's house. *Stark v. Telegraph Co.*, 332.

6. *Carriage of goods. Liability. Connecting carriers.*
Where goods were sold at a stipulated price, if they arrived on schedule time, but the carrier was not informed of this arrangement, and not arriving in time, the buyer refused to accept them and the owner was forced to resell them at the best price obtainable, the measure of damages was the difference between the market price of the goods at the time when they should have arrived and when they did arrive. *Railroad Co. v. Lyon & Co.*, 777.

DEBTOR AND CREDITOR.

Trusts. Construction. Interest of cestui que trust. Rights of creditors.
Where testatrix devised all her property to her husband in trust for her children, giving him power to use, control, manage, exchange and sell it or any part thereof and to make deed to the same, until each of the children should arrive at the age of twenty

DEBTOR AND CREDITOR—Continued.

years, when it should be equally distributed among those living, and directing him in the meantime to support them out of the income, a child did not have such an interest in the property as could be subjected by a creditor to the payment of his debt, nor could the court enter a decree directing payment out of the amount which would be due such child when the time for distribution arrived. *Mitchell v. Choctaw Bank*, 814.

DEEDS.

1. *Estoppel. Laws* 1898, *chapter* 41. *Laws* 1904, *chapter* 124.
Where a defendant holding a ninety-nine year lease of sixteenth section lands, but not owning the timber thereon, in good faith executed a warranty deed of the timber to complainants' predecessor, and after the defect of title was discovered, without consideration, conveyed her leasehold interest to another defendant, who for their joint account purchased all the merchantable timber on the land from the board of supervisors who were authorized by Laws 1898, chapter 41, and Laws 1904, chapter 124, to sell the merchantable timber. In such case on complainant's payment of the amount paid to acquire the paramount title, equity will decree that the title obtained by defendants inured to the benefit of complainant, and will decree that defendants convey such title to complainant. *Sawmill Co. v. Douglas*, 678.

2. *Sale of standing timber. Cancellation.*
The owner of land in fee, who by warranty deed conveyed the timber standing thereon, together with the right to enter and remove the same, without limiting the time of its removal, is not entitled to a cancellation of the deed because the purchaser has failed to remove the timber in a reasonable time. *Product & Mfg. Co. v. Buckley*, 897.

See TENANTS IN COMMON.

DEEDS OF TRUST.

See MORTGAGES.

DELEGATION OF DUTY.

1. *Trustees. Ministerial duty.*
The board of trustees of the state penitentiary cannot delegate to another the duty of selling the penitentiary products since that

DELEGATION OF DUTY—Continued.

involves the exercise of discretion, but they may delegate to another the ministerial duty of indorsing checks and depositing them with the state treasury, and hence a member of the board of trustees is not guilty of official misconduct because the secretary of the board embezzled funds which he was authorized to deposit or without authority, sold products of the penitentiary and converted the proceeds. *Montgomery v. State*, 518.

2. *Eminent domain. Statutory proceedings. Construction of statute.*
A deputy circuit court clerk may appoint a justice of the peace to constitute, with a jury, a special court of eminent domain, as provided by section 1856, Code 1906, since under the power conferred by Code 1906, section 1006, a deputy clerk is authorized to perform all the acts and duties which their principals may lawfully do, and this includes acts done under special authority. *Tel. Co. v. Railroad Co.*, 626.

DEMURRER.

1. *Banks. Action against directors. Demand on receiver.*
A declaration which avers that plaintiff was a depositor of a bank and that defendants were directors of said bank and wilfully and negligently failed to perform their duties as directors and failed, neglected and refused to supervise the business of the bank, and that because of the directors' negligent failure and refusal to perform their duties, the bank had become insolvent and a receiver had been appointed to wind up its affairs and in consequence, plaintiff lost his claim against the bank, is demurrable because it does not allege that the receiver of the bank had been requested to bring suit and had refused to do so. *Hardin v. McKnight*, 73.

2. *Pleading.*
A general demurrer must be sustained or overruled in its entirety. *N. O. & N. E. R. Co. v. N. O. G. N. R. Co.*, 453.

DEPOSITORIES.

1. *Public moneys. Trust fund. Unsecured excess. Creation. Qualification. Code 1906, section 3485.*
When the board of supervisors have elected a depository of county funds under the act of the legislature authorizing such depositories to be selected, and when the advertisement calls for bids for all of the county funds and fixes the amount of security to be

DEPOSITORIES—Continued.

given, and when the bid accepted is for all of the county funds and the security required by the advertisement is given, and when the order of the board awards all of the county funds to the successful bidder, there being at that time less than the amount of the security with ten per cent off, on deposit, and afterwards the board permits the depository to have in its hands a greater amount of public funds than it has security for, Code 1906, section 3485, providing that public moneys deposited in a bank shall constitute a trust fund and not be liable to be taken by creditors of the bank, applies to such excess, though not to the funds secured; the excess being received into the bank, not in its capacity as a depository, but simply as a bank receiving public funds. *Powell v. Tunica County*, 410.

2. *Creation. Qualification.*

The selection of a bank does not complete its creation as a county depository. This is only accomplished by the depositing of the securities, which is followed by the issuance of a commission showing its qualification as a depository to receive and disburse funds in amount not exceeding a sum stated. *Ib.*

DESCENT AND DISTRIBUTION.

Adopted child. Inheritance.

Property inherited by an adopted child goes to the child in fee simple, and upon its death the property descends according to the law of descent and distribution of this state, which would be its blood relatives. *Fisher v. Browning*, 730.

See ADOPTION.

DRAINAGE DISTRICTS.

1. *Drains. Jurisdiction.*

Under section one of the Laws of 1912, chapter 195, providing for the creation of drainage districts, power is conferred upon the chancery court to create a drainage district only when the land embraced therein lies in more than one county, and where the only part of such district lying in another county is the bank of a bayou and land under a lake which cannot share in the benefits, the chancery court is without jurisdiction, and the fact that this lake and bayou can be used as outlets for the drainage system of the district is immaterial for the reason that the method by which such outlets are to be acquired is provided for in section 21, of the act. *Low v. Drainage Dist.*, 583.

DRAINAGE DISTRICTS—Continued.

2. *Organization of district. Jurisdiction.*
Where a petition is filed with the chancery clerk of a county under chapter 197, of the act of 1912, entitled, "An act to create additional methods of organizing and maintaining drainage districts and providing for the validity of any drainage district heretofore organized under chapter 39, of the Code 1906, that may come under the provision of this act," this does not confer any jurisdiction to create a district under sections 1682-1727, since a landowner examining the petition in which the statute under which the district is to be created is designated, is entitled to rely upon its being created in accordance therewith, and might seriously object if it were created under some other statute having different provisions. *Hardee v. Brooks*, 821.

EASEMENTS.

1. *Ways of necessity. Bona fide purchaser of servient estate.*
A way of necessity over the land of the grantor arises when one sells to another a tract of land, surrounded by other lands owned by him. In such case the way is implied from the grant made. *Lamar County v. Elliott*, 841.

2. *Fixing ways.*
Where a grantor grants lands wholly surrounded by his other lands, he has the right when necessity therefor arises, to fix the line of the way of necessity over his land. But if he fails to exercise the right then the grantee can locate the way over his land. *Ib.*

3. *Ways of necessity. Right to.*
Where land wholly surrounded by other land belonging to the grantor, is sold and conveyed for use as a school, the fact that the grantee is a municipality or a subdivision of the state, which has the right of eminent domain, does not prevent the grant from carrying with it an easement of a right of way by which teachers and pupils can reach the school. *Ib.*

EJECTMENT.

1. *Pleading. Bill of particulars. Code 1906, section 1827.*
Section 1827, Code 1906, providing for a bill of particulars in an action of ejectment, contemplates only that either party shall inform the other, when requested so to do, of the evidence documentary or verbal, by which he expects to establish his own

EMINENT DOMAIN—EQUITABLE TITLE.

EJECTMENT—Continued.

title or rather, of the deed or other sources of title through which he claims and not that he shall inform the other party of evidence which he will introduce in order to show the invalidity of one deed or the source of title through which such other party claims. *Mitchell v. Tubb*, 221.

2. *Boundaries. Survey. Accuracy.*

Where in an action of ejectment, plaintiff relied on a survey to establish the dividing line, which was the matter in controversy between the parties in the case, it does not appear from the testimony of the surveyor, that he located an established corner or monument of the original survey made by the United States Surveyor as a starting point in his survey. It cannot be said that he had a sufficiently established corner or place from which to run his lines, and a line thus run is not sufficiently certain and accurate as to enable a party relying thereon to maintain ejectment. *Burton v. Buttler*, 344.

EMINENT DOMAIN.

1. *Statutory proceeding. Compliance.*

Under Code 1906, section 1856, providing that the application to condemn land under the right of eminent domain, shall be presented to the clerk of the circuit court of the county, who shall indorse thereon his appointment of a competent justice of the peace of the county to constitute, with a jury, a special court of eminent domain, the essential requirements is that the justice of the peace shall be appointed in writing and the indorsement thereof upon the application is a mere detail to provide for the more effectual preservation of the evidence of the appointment, and failure to do so is a mere irregularity, not reviewable in a suit in equity to restrain the taking of the property awarded in the proceedings. *Tel. Co. v. Railroad Co.*, 626.

2. *Right to exercise. Telegraph companies.*

While the act of congress passed July 24, 1866 (Act July 24, 1866, chapter 230, 14 Stat. 221), contains no provision conferring upon telegraph companies the right to obtain by eminent domain proceeding a right of way along the line of a railroad company, yet the state has the power to confer such right and section 929, Code 1906, conferring the right of eminent domain upon telegraph companies is a valid exercise of such power. *Ib.*

EQUITABLE TITLE.

See LANDS AND LAND TITLES.

EQUITY—EVIDENCE.

EQUITY.

Pleading. Multifariousness. Code 1906, *section* 598.

Under Code 1906, section 598, so providing, the uniting in the same bill of several distinct and unconnected matters of equity against the same defendant does not render the bill multifarious. *N. O. & N. E. R. Co. v. N. O. G. N. R. Co.*, 453.

ESTOPPEL.

Gifts. Delivery. Notes. Gifts causa mortis.

Where a testatrix before her death made a valid gift *causa mortis* of certain notes, the donee is not estopped to claim them because of delivering them to the executor, making no claim to them and consenting to the probate of the will, no one being thereby misled to his prejudice or caused to give up anything. *Pace v. Pace*, 292.

EVIDENCE.

1. *Witnesses. Code* 1906, *section* 1917. *Disqualification. Estate of deceased.*

The rule of evidence as contained in section 1917, Code 1906, providing that "a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person which originated during the lifetime of such person," applies only to the person who has a claim or defense against the estate of a deceased person, it does not apply to the wife of such person. *Spivey v. Walton*, 56.

2. *Parol evidence. Bills and notes.*

In a suit on a promissory note where there are no contractual provisions in the note relative to its consideration, parol evidence is admissible to show a failure of consideration. *Bank v. Smith*, 105.

3. *Intoxicating liquors. Offenses.*

The proof of possession of liquors, without proof evidencing the purpose of selling or giving away the same in violation of law, is not sufficient for conviction. *Jackson v. State*, 153.

4. *Intoxicating liquors. Illegal sale. Admissibility of evidence.*

In a prosecution for the unlawful sale of liquors, where the state witnesses did not definitely locate the date of the alleged sale, and both of them testified that they only obtained the liquor from defendant once, the court should have permitted the de-

EVIDENCE.

EVIDENCE—Continued.

fendant to introduce evidence that the sale occurred in another county. *Mosley v. State*, 158.

5. *Judicial notice. Process.*

To sustain a judgment by default, it must affirmatively appear that the defendant was served with process. *Fire Ins. Co. v. Sayle*, 169.

6. *Confessions. Admissibility. Sufficiency of preliminary evidence.*

If on preliminary hearing by the court, there is a reasonable doubt as to whether a confession was freely and voluntarily made, it must be excluded from the jury, and after a confession has, on preliminary hearing by the court, been admitted to go to the jury, either party may introduce the same evidence as was submitted to the court, and any additional evidence relative to its weight or credibility, and if it then, or at any stage of the trial, appears that the confession was made under circumstances rendering it incompetent, it should be excluded. It is necessary to look to all the surroundings of the person making the confession in order to determine whether it is rendered inadmissible because it resulted from fear or threat or undue influence of a person, even though one not in authority, operating upon the mind of the person confessing. Even the act of third persons may amount to a threat excluding confession though no objectionable words are spoken. *Johnson v. State*, 196.

7. *Criminal law. Banks. Receiving deposits. Criminal prosecution. Admissibility of evidence.*

It is not admissible in order to show the insolvency of the bank, in a prosecution of a bank cashier for receiving a deposit after he knew or had good reasons to believe the bank insolvent, to introduce the record of a judgment against the bank, from which an appeal has been taken and is still pending. *McConnico v. State*, 265.

8. *Principal and surety. Action against surety. Evidence.*

The exclusion of evidence as to expenditures while the principal was absent was error. *First Baptist Church v. Hendricks*, 267.

9. *Best and secondary evidence. Notice to produce.*

Under Laws 1908, chapter 196, providing for the recovery of a penalty if the carrier failed to settle a claim after sixty days written notice, such written notice is the best evidence and evidence of its contents in the absence of proof of its loss or failure

EVIDENCE.

EVIDENCE—Continued.

to produce after notice, is not admissible. *Jordan v. Railroad Co.*, 323.

10. *Best and secondary evidence. Loss of primary evidence.*
Parol evidence of the contents of a letter is admissible when it is proven that the letter has been lost. *Ib.*

11. *Trial. Peremptory instruction. Taking case from the jury.*
A peremptory instruction should not be given, where there is a conflict in the material testimony of the case. *Seutter v. Bank of Commerce*, 342.

12. *Confession. Plea of nolo contendere.*
A plea of *nolo contendere* is only a limited confession of the charge and does not amount to a general confession of guilt and is not binding on the defendant in another prosecution even for the same offense, and cannot be introduced against him. *Chester v. State*, 459.

3. *Trial. Conflicting evidence. Question for jury.*
Where on the trial of a case, the evidence is conflicting, a peremptory instruction should not be given. *Waldrop & Thomas v. Crittended & Co.*, 595.

14. *Admissions. Acquiescence by silence.*
Where accused was imprisoned with his wife, who had been convicted of murder, evidence that his wife had been overheard to say to him that he forced her to kill deceased and to take the responsibility, was not admissible on the ground that he did not deny her statement, but was silent, since under the circumstances of this case a normal man would probably have remained silent. *Riley v. State*, 600.

15. *Appeal. Prejudice.*
In a trial for murder it was not reversible error to admit the testimony of a witness, in reference to the angle at which certain bullets entered into a post or wall in the room in which the killing occurred, where such testimony was immaterial, and the question of accused's guilt was not dependent upon the direction or angle of the bullets, but upon the question as to whether he or some other person fired the fatal shot. *Le Barron v. State*, 663.

16. *Photographs.*
A photograph may be introduced in evidence after it has been shown by preliminary testimony that it is a true and faithful

EVIDENCE—Continued.

representation of the place or subject as it existed at the time of the commission of the crime. *LeBarron v. State*, 663.

17. *Same.*

It is necessary that a photograph offered to be introduced in evidence should be practically instructive as evidence, and whether it is so, or whether it has been sufficiently verified, is a preliminary question to be determined by the judge presiding at the trial. *Ib.*

See EJECTMENT; WITNESSES.

FORGERY.

1. *Criminal law. Elements. Instruments subject to forgery.*

In order that forgery may be committed, the writing alleged to have been forged must be one which, if genuine, might injure another. *Moore v. State*, 181.

2. *Instruments subject to forgery. Report of public school. Code* 1906, *sections* 4497-4522-4556-4557-4560.

Under Code 1906, sections 4497-4522-4556-4557-4560, so providing the only person entitled to receive a certificate for the payment of salary due for teaching school in a school district from the county superintendent of education, are such as have been elected teachers by the trustees of the district or appointed by the superintendent, and a false report of a public school purporting to be signed by one who had neither been elected by the trustees nor appointed, nor contracted with by the superintendent as a teacher of the school, did not authorize the superintendent to issue a pay warrant thereon, and hence though false in fact, and though the superintendent issued a certificate for the payment of salary thereon, it could not be the subject of forgery. *Ib.*

FRAUD.

1. *Acts constituting.*

Fraud involves a breach of duty, trust or confidence, it includes all acts, omissions, or concealments by which another is injured or an undue and unconscientious advantage is taken. *Smith v. State*, 486.

2. *Sale of stock. Surrender of consideration.*

Where complainant was induced by false representation as to its financial situation to purchase the stock of a company and before

FRAUD—Continued.

finding out the falsity of such representations sold the stock to another, he did not thereby ratify the sale to him so as to prevent him from maintaining a suit to set it aside, and to cancel his notes given to secure a part of the price. *Jones v. Barnes*, 800.

"FUTURES."

See CONTRACTS.

GIFTS.

1. *Delivery. Notes.*

The delivery of notes payable by the donor to the donee perfects a gift thereof to the donee. *Pace v. Pace*, 292.

2. *Delivery. Bank books.*

A delivery of the donor's bank book is not sufficient to perfect a gift *causa mortis* of his funds in the bank, since to perfect such a gift, there must be a legal delivery of the thing given. *Ib.*

See WILLS.

GRAND JURY.

County prosecuting attorney. Presence before grand jury. Indictment and information. Motion to quash. Grounds. Appeal. Evidence. Prejudice. Photographs. Rulings.

It is made the duty of the county prosecuting attorney under Laws 1912, chapter 253, section 5, to represent the state in all matters coming before the grand jury of his county, and it is proper for him to be before the grand jury in its investigations of offenses but he should take no part in the jury's deliberations. *Le Barron v. State*, 663.

HEIRS.

Inheritance by adopted children. What law governs.

Since the descents of lands is governed by the *lex rei sitae*, and since lands in Mississippi must descend according to the laws of Mississippi and since under the laws of this state an adopted child may not inherit from foster parents unless so specified in the petition for adoption and the decree of the court in response thereto, where a child was legally adopted in Kentucky under such proceedings as entitled it to inherit real property in that state, but which proceedings did not give it such rights

HEPBURN ACT—INDICTMENTS.

HEIRS—Continued.

in Mississippi, where its foster parents resided, in such case the adopted child had no interest in the land of its foster father in Mississippi, which on his death without natural children descended to his widow. *Fisher v. Browning*, 729.

See ADOPTION.

HEPBURN ACT.

Carriers. Liability of initial carrier. Statute. Construction.

The Carmack Amendment to the Hepburn Act, approved June 29, A. D. 1906 (34 Stat. 593, U. S. Comp. St. Supp. 1911, page 1307) chapter 3591, section 7, pages 11, 12, declaring that every railroad company receiving property for transportation from one state to another shall issue a receipt therefor, and shall be liable for any loss caused to it by any carrier to which the property may be delivered or over whose line it may pass, makes the initial carrier liable for delay by a connecting carrier, although the bill of lading provides otherwise. *Railroad Co. v. Lyon & Co.*, 777.

INCOMPETENCY.

Master and servant. Negligence of fellow servant.

Incompetency denotes the converse of reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment. *Ingram Day Lumber Co. v. Joh*, 43.

INDICTMENTS.

1. *Subornation of perjury. Evidence.*

Where an indictment charged that accused attempted to induce one Bardsley to commit perjury by swearing that he, Bardsley had not bought cocaine from one Cox and to act crazy before the grand jury, a conviction of subornation of perjury cannot be had unless the state shows by evidence: First, that Cox had sold Bardsley cocaine, and second, that Bardsley knew that Cox was the person who sold him the cocaine, and third, that accused knew that in the event Bardsley testified that he did not know who sold him the cocaine, he would be stating that which would be false. *Smith v. State*, 404.

2. *State officers. Code* 1906, *section* 1144. *Fraud.*

Under Code 1906, section 1144, providing that any officer or other person employed in any public office committing any fraud or

INDICTMENTS—Continued.

embezzlement therein, should be punished as therein provided, an indictment charging that accused, a trustee of the state penitentiary, fraudulently caused to be bought and participated in buying an automobile from himself and a third person, and fraudulently procured and assisted in causing and procuring it to be paid for, and that the price therefor was well known to him to be exorbitant, unreasonable, and a fraud upon the state, whereby the state was cheated and defrauded out of the sum paid, was sufficient. *Smith v. State*, 486.

3. *Multifariousness.*

In an indictment or information the state must charge one offense and not many, and the defendant is only called upon to meet one charge, when the indictment contains but one count, and this charge must be definite and unambiguous. *Montgomery v. State*, 518.

4. *Prison. Trustees.*

Where an indictment charged accused with the violation of his duty as a member of the board of trustees of a penitentiary, first setting forth that it was the duty of the board of trustees to sell crops, receive the proceeds of such sale and pay them into the state treasury and further alleged that accused, though well knowing his duty, failed and refused to collect the proceeds of cotton seed sold to named persons, and to pay them into the treasury, and that the trustees, in nowise regarding their duty, did wilfully fail and refuse to sell such cotton seed and that the board of trustees failed to receive the money for the sale of the cotton seed not sold. In such case the indictment was insufficient under Constitution 1890, section 26, which accords to every person, charged with crime, the right to demand the nature and cause of the accusation, since it was uncertain whether the cotton seed had been sold and accused failed to collect the proceeds, or whether, after collection accused failed to pay the same into the treasury of the state, or whether the board of trustees refused to sell and collect the proceeds and pay them into the treasury. *Montgomery v. State*, 519.

5. *Intoxicating liquor. Offenses. Place. Code* 1906, *section* 1771. *Laws* 1908, *chapter* 115.

An indictment charging defendant with having assisted a third party to buy whiskey in a place outside the state, charges no offense. Since under Code 1906, section 1771, as amended by Laws 1908, chapter 115, making it an offense to act as agent

INDICTMENTS—Continued.

or assistant to either the seller or purchaser in effecting a sale of any liquor, a sale of which is unlawful under the provision of the act, the sale of whiskey outside the state is not unlawful or violative of the provisions of said act. *State v. Owen*, 565

6. *Motion to quash. Grounds.*

It is no ground to quash an indictment that the district attorney was before the grand jury during its deliberation and when the indictment was voted on, in the absence of a showing that a defendant was prejudiced thereby, since it is his duty to render assistance to the grand jury whenever his services will be helpful. *Le Barron v. State*, 663.

INJUNCTION.

1. *Rendering final judgment.*

The court on appeal from an order refusing to dissolve a temporary injunction for want of equity on the face of the bill, cannot on reversing the order dismiss the bill because the only final judgment which the supreme court can render on reversal is such as should have been rendered in the court below, and such court on motion to dissolve was without authority to dismiss the bill. *Tel. Co. v. Railroad Co.*, 626.

2. *Remedy by appeal. Proceedings. Objections.*

The fact that the owner did not appear and object at the hearing of a petition for the creation of a drainage district, nor appeal to the supreme court from an order establishing such district, does not preclude him, on the filing of a bill to enjoin the issuance and sale of bonds of the established district, from questioning the court's jurisdiction to establish the district, where such question was one of law to be determined by an inspection of the record, although if the objection raised only a question of fact, the chancellor's decision at the hearing could only be reviewed by appeal. *Hardee v. Brooks*, 821.

INSTRUCTIONS.

1. *Misleading. Application to evidence.*

In a suit for personal injury by a servant against the master it was error to grant an instruction for the plaintiff "that if the jury believe from the evidence that the defendant is guilty of the acts of negligence complained of in the declaration they will find for the plaintiff," where there were two counts in the

declaration and there was no evidence to support the first count. *Newman Lumber Co. v. Dantzler*, 31.

2. *Request. Necessity.*

The court is not required to give an instruction on an issue arising in the case unless requested so to do. *Akroyd v. State*, 51.

3. *Larceny. Evidence.*

An instruction defining larceny, was unobjectionable, where the issue was whether accused lawfully obtained possession of the property and then converted it to his own use, and hence was not guilty of larceny, or whether he obtained possession fraudulently, with the felonious intent at the time to deprive the owner thereof, followed by conversion, which would make him guilty of larceny. *Ib.*

4. *Railroad. Questions for jury. Care required.*

Where in a suit against a railroad company for the killing of stock by its running train, the evidence showed that the train was properly equipped with all necessary appliances for safe use, was under control and that the engineer was on the lookout and as soon as he saw or could have seen the stock on the track did all he could by whistling and putting on the brake to prevent the killing, but the same was unavoidable, a peremptory instruction for the defendant should have been given. *Railroad Co. v. Morrison*, 300.

5. *Peremptory. Taking case from the jury.*

A peremptory instruction should not be given, where there is a conflict in the material testimony of the case. *Seutter v. Bank of Commerce*, 342.

6. *Oral.*

It is reversible error for the trial court to orally instruct the jury as to the verdict they were authorized to render. *Simmons v. State*, 463.

7. *Appeal. Harmless error.*

Where a trustee of the state penitentiary was tried for fraud, consisting in buying and participating in buying an automobile from himself and a third party, and causing and procuring payment to be made by the state, knowing that it had not been purchased as provided by law, and that the price was exorbitant and unreasonable, instructions, that if accused, as trustee, voted for an order to pay the third party a specified sum of the state's funds

INSTRUCTIONS—Continued.

for the purchase of the automobile, and if such sum was paid in accordance therewith, and if defendant then knew that that sum was grossly in excess of the value of the machine, it would be the jury's duty to find him guilty, and that, if under the contract for the sale of the automobile to the state, it was to be delivered at the penitentiary farm in good condition, the sale was not completed until such delivery in good condition, and that if it was not so delivered in good condition, and the sum paid was a grossly exorbitant price for the automobile at the time it was paid for, and defendant knowing the price to be grossly exorbitant voted to pay such sum and such sum was paid by the state, it would be the jury's duty to find him guilty; while narrowing the issue presented by the indictment and proof did not do so to the prejudice of accused. *Smith v. State*, 487.

8. *Attacking accused.*

An instruction for the state in a criminal case "that the jury do not have to believe a witness just because he testifies, and may take into consideration his interest if any, and believe or disbelieve any witness as the jury may find the truth in all of the testimony," is erroneous under the facts of this case as singling out for attack the testimony of accused who took the stand. *Pigott v. State*, 552.

9. *Form of verdict. Form and requisites. Surplusage.*

An instruction for the state in a murder case, that the jury may "if warranted by the evidence" find defendant not guilty, is not misleading, where numerous other instructions for the defendant, informed the jury that it was their duty to acquit the defendant, if they had any reasonable doubt of his guilt arising out of the evidence or the want of evidence in the case. *Smith v. State*, 574.

10. *Same.*

In order to arrive at the proper meaning of an instruction, all the instructions both those given for the state and those given for the defendant must be considered together. *Ib.*

11. *Conflicting evidence. Question for jury.*

Where on the trial of a case, the evidence is conflicting, a peremptory instruction should not be given. *Waldrop & Thomas v. Crittended & Co.*, 595.

See APPEAL AND ERROR; RAPE.

INSURANCE—INTERSTATE COMMERCE

INSURANCE.

1. *Mutual benefit. Children. Code* 1906, *section* 1655.

Under the Constitution and by-laws of a mutual benefit association, providing that benefits should be payable only to certain relatives including "children," an illegitimate child of a female member is not excluded from sharing the benefits, in view of section 1655, Code 1906, which provides that illegitimate children shall inherit from their mother. *Shelton v. Minnis*, 133.

2. *Statutes. Mutual assessment company. Lien. Laws* 1912, *chapter* 171.

Laws 1912, chapter 171, section 18, which provides that premium notes taken by mutual fire insurance companies and all assessments shall constitute a lien on the property insured, and the land on which it is situated, upon the filing of a certificate with the clerk of the chancery court showing the facts is not invalid because it contains no direction as to what particular book in the office of the clerk of the chancery court, the certificate shall be recorded in, since the lien commences upon the filing of the certificate with the clerk and it makes no difference whether it is recorded or not. *Huggins v. Fire Ins. Co.*, 650.

INTERSTATE COMMERCE.

1. *Carriers. Bills of lading. Code* 1906, *section* 4851.

Since the adoption by Congress of the Carmack amendment the Interstate Commerce Act of February 4, 1887 (Act June 20, 1906, chapter 3591, section 7, 34 Stat. 393, U. S. Comp. St. Supp. 1911, page 1307), covering the subject of bills of lading for interstate shipments, section 4851 of Code 1906, making bills of lading conclusive in the hands of *bona fide* holders for value, against the person or corporation issuing them, that the property described therein was received by the carrier, has no application to interstate shipments of freight. *So. Ry. Co. v. State Cotton Co.*, 71.

2. *Commerce. Regulation. Power of state. Shipment of liquors. Validity and application of statutes.*

Laws 1914, chapter 127, sections 2-7 and 11, paragraph 2, known as the May-Mott-Lewis Act making it unlawful for any person to order and have shipped to him, or for him to receive from without the state intoxicating liquors in excess of one gallon, does impose a direct burden on interstate commerce, but is authorized by the Webb-Kenyon Act (Act March 1, 1913, chapter 90, 37 Stat. 699) divesting intoxicating liquors of its interstate character, when it is intended by any person interested therein to be received in violation of the laws of the state into which it is shipped, even as applied to liquor being shipped for personal

INTERSTATE COMMERCE—Continued.

use of the consignee and his family and not to be sold or used unlawfully. *American Express Co. v. Beer*, 528.

3. *Commerce. Commerce clause. Operaton.*
The commerce clause of the Federal Constitution excludes state regulation and control only over interstate commerce in articles that are legitimate subjects of trade and, in the absence of congressional legislation declares what are and what are not legitimate subjects of trade. *Ib.*

4. *Commerce. Power of state. Restriction on right to remove cause to federal court.*
While a state can for any reason it sees proper exclude from doing business within its boundaries, a foreign corporation authorized only to do a purely interstate business, yet its power over a corporation which is an instrument of interstate commerce such as a foreign railroad corporation engaged both in interstate and intrastate business, is subject to limitations, one of which is that it cannot deprive it of a right guaranteed by the Federal Constitution, as the right to remove a suit from a state court to a federal court; and therefore it cannot as was attempted by Laws 1908, chapter 122, penalize it, by prohibiting it from doing an intrastate business, merely because it had exercised the right of removal. *Railroad Co. v. State*, 597.

See MONOPOLY.

INTERPLEADER.

Effect. Code 1906, section 772.
The interpleader provided for in Code 1906, section 772, is merely a substitute for the original interpleader in equity, which could not be sustained unless the interpleader was a naked trustee of the property for which there were two or more claimants, to either of whom he was willing to deliver it, and hence a defendant, who filed a bill of interpleader, cannot, when the party interpleaded did not appear and set up his claim, complain that the court awarded judgment for plaintiff, for the filing of the interpleader admitted defendant's liability. *McAlister Bros. & Co. v. Sanders*, 283.

INTOXICATING LIQUORS.

1. *Illegal sale. Admissibility of evidence.*
In a prosecution for the unlawful sale of liquors, where the state witnesses did not definitely locate the date of the alleged sale, and both of them testified that they only obtained the liquor from defendant once, the court should have permitted the de-

INTOXICATING LIQUORS—Continued.

fendant to introduce evidence that the sale occurred in another county. *Mosley v. State*, 158.

2. *Sales. Acts constituting.*
A boarding house keeper who serves wine to his guest with their meals without extra charge for the wine is guilty of the unlawful sale of intoxicating liquors. *Skermetta v. State*, 429.

3. *Second offense. Punishment. Code* 1906, *chapter* 214.
Where accused was tried for the unlawful sale of intoxicating liquors, as for a first offense, and the indictment did not charge a former conviction, he can only be punished as for a first offense under Laws 1912, chapter 214. *Gaston v. State*, 484.

4. *Commerce. Regulations. Shipment of liquors. Validity of statute.*
The provisions in Laws 1914, chapter 127, section 5, known as the May-Mott-Laws Act, that those transporting liquors into the state shall keep a record of the same and file statements thereof with the clerk of the circuit court, is not invalid as imposing a direct burden on interstate commerce, regardless of whether or not it is within the Webb-Kenyon Act (Act March 1, 1916, chapter 90, 37 Stat. 699) which prohibits the transportation of liquor from one state into another for sale in violation of any law of the state where received. *American Express Co. v. Beer*, 528.

5. *Offenses. Place. Code* 1906, *section* 1771. *Laws* 1908, *chapter* 115.
An indictment charging defendant with having assisted a third party to buy whiskey in a place outside the state, charges no offense. Since under Code 1906, section 1771, as amended by Laws 1908, chapter 115, making it an offense to act as agent or assistant to either the seller or purchaser in effecting a sale of any liquor, a sale of which is unlawful under the provision of the act, the sale of whiskey outside the state is not unlawful or violative of the provisions of said act. *State v. Owen*, 565.

6. *Offenses. "Keep for sale."*
The two Acts, Code 1906, section 1746, as amended by Acts 1908, chapter 115, making it unlawful to "keep for sale" intoxicating liquors, and Code 1906, section 1797, as amended by laws 1908, chapter 114, making it unlawful "to have in possession" any intoxicating liquors with the intention of selling, create separate and distinct offenses, and proof of possession with intent to sell, without more is not sufficient to support a conviction under the former act; to "keep for sale" meaning to habitually have on hand. *Collins v. State*, 619.

See CRIMINAL LAW.

INTRASTATE COMMERCE.

Transactions constituting. Imports.

Sales and distributions of petroleum where made by a company after the petroleum had been received by it in this state and had become incorporated into the general map of property therein, constituted intrastate commerce, and are governed by state's laws. *Standard Oil Co. v. State*, 377.

See MONOPOLY.

JUDGMENT AND DECREE.

1. *Bills and notes. Action by indorsee. Right of recovery. Defenses. Bona fide purchasers.*

Where a purchaser of land gave his note for the purchase price under a contract providing that when the purchase price was paid in full the vendor should execute a full warranty deed to the purchaser, it was not necessary for the *bona fide* endorsee of said notes to tender a deed in order to obtain judgment on the same. *Funding Corporation v. Pennington*, 10.

2. *Divorce. Alimony. Issues. Adjudication.*

Where a husband is cited for contempt in failing to comply with an order of the court requiring payment of alimony *pendente lite* and defended on the ground of financial inability to comply with the order, and the judgment against him for contempt recited that the chancellor was fully advised as to all matters and things pertaining to the proceeding, and being so advised, determined that defendant was in contempt, such a judgment necessarily found that he was able to comply with the decree. *Hamblin v. Hamblin*, 113.

3. *Evidence. Process.*

To sustain a judgment by default, it must affirmatively appear that the defendant was served with process. *Fire Ins. Co. v. Sayle*, 169.

4. *Judgment by default. Recitals.*

Recitals in a judgment by default that the court found that the defendant had been duly served, will not support the judgment, when the record shows that the service was insufficient. *Ib.*

5. *Lien. Property covered. Debts. Code* 1906, *section* 819.

The lien of an enrolled judgment upon the property of a defendant as provided in section 189, Code 1906, does not extend to cover the right to receive or recover a debt. *Bryan v. Hardware Co.*, 255.

JUDGMENT AND DECREE—Continued.

6. *Adoption. Proceedings. Decree. Rev. Code, 1871, section 525.*
Where a petitioner proceeding under Revised Code 1871, section 525, which provides that the prayer of a petition for adoption may be granted in whole or in part, filed a petition alleging that the adopting parent intended to make the child his sole heir, but the prayer of the petition did not contain such a provision, and the order of adoption followed the prayer and provided only that the child be adopted, and that the name be changed, in such case the judgment did not vest in the child the right of heirship in the estate of the adopting parent. *Leonard v. Lumber Co.*, 345.

7. *Courts. Decisions of state courts. Review by supreme court.*
The supreme court will not after a case had been finally disposed of, enter an order, based solely on the recollection of the judges composing that court, that in reaching its decision the court did or did not take into consideration certain arguments advanced on points raised by counsel engaged in the cases especially where it cannot be determined upon what points the court agreed, because the matter was not considered in conference. *Wheeler & Silber v. Drainage Dist.*, 481.

8. *Equity. Decree. Conformity to pleadings. Bill.*
Where complainants filed a bill in chancery against defendant and a bank, in which it was alleged that defendant had procured complainant to execute their notes by fraud and had negotiated them to the bank, which took with notice, and which had brought suit thereon, and the relief prayed for was to restrain the suits on the notes and for their surrender; and that defendant be decreed primarily liable to the bank and that the bank's remedy against him be first exhausted, and that complainants might have a decree over against defendant for any amount for which they were adjudged liable, and generally for other relief, in such case there being no showing that complainant had been compelled to pay anything on the notes, or had yet been otherwise damaged by their execution, a decree requiring defendant to pay complainant the amount of the notes, was improper as not within the prayer for relief nor supported by the allegations of the bill. *Blythe v. Simmons*, 510.

9. *Rendering final judgment.*
The court on appeal from an order refusing to dissolve a temporary injunction for want of equity on the face of the bill, cannot on reversing the order dismiss the bill because the only final judg-

JUDICIAL NOTICE—JURIES AND JURORS.

JUDGEMENT AND DECREE—Continued.

ment which the supreme court can render on reversal is such as should have been rendered in the court below, and such court on motion to dissolve was without authority to dismiss the bill. *Tel. Co. v. Railroad Co.*, 626.

10. *Review.*
A chancellor's decree on the facts of a case will not be disturbed when amply supported by the testimony. *Freeman v. Freeman*, 750.

11. *Harmless error. Submission of issues.*
In a suit for damages caused by a seller's failure to deliver cotton of the grades contracted for, if the court erred in instructing the jury to disallow defendant's claim of set-off based on plaintiff's refusal to accept the cotton tendered, which it alleged was of the grades contracted for, such error was harmless, where evidence as to defendant's loss by the rejection of the cotton was admitted, and the question whether the cotton tendered was equal to the sample by which it was sold was clearly submitted to the jury and decided against the defendant. *Hoover Commercial Co. v. Humphrey*, 810.

See INTERPLEADER.

JUDICIAL NOTICE.

1. *Evidence. Appointment of agent.*
In the absence of a certified copy of the instrument constituting and appointing the commissioner of insurance its "true and lawful attorney," there is no way by which the court could judicially know that the commissioner was authorized to acknowledge service for an insurance company. *Fire Ins. Co. v. Sayle*, 169.

2. *Penitentiary farm. Code* 1906, *section* 3589.
Courts cannot take judicial notice that any other farm than the Parchmen farm, named by Code 1906, section 3589, as a part of the state penitentiary, is a part of such institution. *Montgomery v. State*, 518.

JURIES AND JURORS.

1. *Selection. Code* 1906, *section* 2629. *Irregularities. Harmless error.*
Code 1906, section 2629, providing that in counties containing two circuit court districts, a juror shall not be required to serve

JURIES AND JURORS—Continued.

out of his district, except the court in its discretion should otherwise direct, and except when drawn on a special venire, and in either of such excepted cases the jury shall be drawn from the two jury boxes, if the court so direct, one name from each alternately, clearly authorized the summoning of a special venire from both districts of a county containing more than one district, and where the jury boxes from one of the districts had been exhausted, the trial court committed no error in not directing that one name be drawn from each district alternately; it being impossible in such case to be done. *Ferguson v. State*, 559.

2. *Qualification. Opinion.*

In the trial of a criminal case, a juror is competent, who on his *voir dire*, states that while it might take evidence to remove the opinion he had, he could go into the jury box and try the case fairly and impartially according to the law and the evidence, and that what he had heard on the outside would not affect him in deciding the case, and that he could try it just as if he had never heard of the case at all. *Howell v. State*, 568.

JURISDICTION.

Mutual fire insurance. Lien. Enforcement.

The jurisdiction of equity is inherent to enforce the lien given mutual fire insurance companies by the Laws 1912, chapter 171, section 18, upon property insured and it is unnecessary for the statute to expressly confer such jurisdiction. *Huggins v. Fire Ins. Co.*, 650.

JUSTICES OF THE PEACE.

Appeal. Dismissal. Justice's failure to approve bond.

Where an appeal bond from a judgment of a justice of the peace was filed within the time required by law, and the justice stated that the bond was satisfactory, but failed to write his approval thereon and delivered the bond with the other papers in the case to the circuit clerk, it was reversible error to dismiss the appeal, because of the failure of the justice to write his approval on the bond. *Bowles v. Stave Co.*, 289.

KIDNAPPING.

Nature of offense. Code 1906, section 1079.

Under Code 1906, section 1079, a father who by agreement surrendered the custody of his minor child to his wife, is not guilty

KIDNAPPING—Continued.

of kidnapping, because he enticed the child away from the custody of the mother, since the agreement with the mother does not relieve him of the duty to support the child. *State v. Powe*, 770.

LANDS AND LAND TITLES.

1. *Deeds. Bona fide purchaser. Equitable title. Vendor and purchaser. Recordation of deed.*
   A purchaser of land only acquires an equitable interest, where his vendor did not hold the legal title, but only an agreement from the holder of the legal title to convey him the property. *Dedeaux v. Cuevas*, 7.

2. *Bona fide purchaser. Recordation of deed. Code* 1906, *section* 2788.
   Section 2788, providing that every conveyance shall take effect as to all subsequent purchasers for a valuable consideration without notice, only from the time recorded, applies only where the purchasers for a valuable consideration without notice, therein referred to, are purchasers of the legal title or estate and not purchasers of a mere equitable title or estate. *Ib.*

3. *Vendor and vendee. Maxims.*
   In a contest between two purchasers each holding an equitable title to land the one first in time should prevail under the maxim, that where there is equal equity the first in time prevails. *Ib.*

4. *Same.*
   In a contest between two purchasers each holding an equitable title to the land and one acquires the legal title also, he should prevail under the maxim that where there is equal equity the law prevails. *Ib.*

5. *Executors and administrators. Acquisition of title by executors. Tax title. Life estate. Improvements. Right to compensation.*
   The executor of an estate who has not been discharged has such a fiduciary relation to a life tenant and her interest in the land devised as prevents him from acquiring a tax title thereto, so as to defeat her title or that of the remainderman. *Deanes v. Whitfield*, 273.

6. *Easement. Bona fide purchaser of servient estate. Rights of.*
   Where a defendant knew that his grantor had sold land, wholly surrounded by his other land, to be used for a school, and that well established ways were used by the teacher and pupils over

LARCENY—LAWS 1910.

LAND AND LAND TITLES—Continued.

the surrounding land, the defendant on purchasing such surrounding land, takes it subject to the easement. *Lamar County v. Elliott*, 841.

See EJECTMENT.

LARCENY.

Acts constituting. Obtaining possession of property fraudulently with felonious intent. Criminal law. Instructions. Request. Necessity for. Witnesses. Cross-examination of accused. Extent. Appeal. Record.

If the possession of personal property is obtained fraudulently, with the felonious intent existing at the time to deprive the owner thereof, and the person so obtaining it does, in pursuance of such intent, deprive the owner of the property, larceny is thereby committed. *Akroyd v. State*, 51.

LAWS 1898.

Ch. 41. Counties. Board of supervisors. Timber sale. Estoppel. By deed. Grounds. Laws 1904, chapter 124. *Sawmill Co. v. Douglas*, 678.

LAWS 1904.

Ch. 124. Counties. Board of supervisors. Timber sale. Estoppel. By deed. Grounds. Laws 1898, chapter 41. *Sawmill Co. v. Douglas*, 678.

LAWS 1908.

Ch. 114. Intoxicating liquors. Offenses. "Keep for sale." *Collins v. State*, 619.

Ch. 115. Intoxicating liquors. Offenses. Place. Code 1906, section 1771. *State v. Owen*, 565.

Ch. 122. Commerce. Power of state. Restriction on right to remove cause to federal court. *Railroad Co. v. State*, 597.

LAWS 1910.

Ch. 105. Courts. Term of courts. Civil terms. *Mann's Mercantile Co. v. Smith*, 16.

Ch. 210. Licenses. Providing tax. Penalty for non-payment. Statutory provision. *Bennett v. Jones*, 880.

LAWS 1912.

Ch. 104. Licenses. Privilege tax. Penalty for non-payment. Statutory provisions. *Bennett v. Jones*, 880.

Ch. 171. Constitutional law. Class legislation. *Huggins v. Fire Ins. Co.*, 650.

Ch. 195. Drains. Drainage district. Establishment. Courts. Jurisdiction. *Low v. Drainage Dist.*, 583.

Ch. 214. Criminal law. Second offense. Punishment. *Gaston v. State*, 484.

Ch. 253. Grand jury. County prosecuting attorney. Presence before grand jury. Indictment and information. Motion to quash. Grounds. Appeal. Evidence. Prejudice. Photographs. Rulings on evidence. *Le Barron v. State*, 663.

LAWS 1914.

Ch. 127. Commerce. Regulation. Power of state. Shipment of liquors. Validity and application of statutes. *American Express Co. v. Beer*, 528.

LEGAL TITLE.

See LANDS AND LAND TITLES.

LEGISLATION.

Constitutional law. Power of legislature.

The State may distinguish, select and classify object of legislation, and necessarily the power must have a wide range of discretion. *Huggins v. Fire Ins. Co.*, 650.

LESSOR AND LESSEE.

Landlord and tenant. Leases.

A license or lease to go upon land and extract rosin or turpentine from standing trees is not any interest in the land as land but such a lease is personal property and a conveyance of the same need not be in writing. *Newton v. Long*, 349.

LIABILITY.

1. *Corporations. Reorganization. Action against reorganized company. Railroads. Mortgages. Scope of relief. Code* 1906, *section* 4067.

In a suit brought against a new corporation on the theory that it was simply a reorganization of an old corporation, which was

LIABILITY.

LIABILITY—Continued.

liable to plaintiff, the agreed statement of facts was held by the court not to show that the new corporation was a reorganization of the original corporation and liable for its debts. *N. O. M. & C. R. Co. v. Carter*, 1.

2. *Railroads. Mortgages. Liabilities secured. Scope of relief. Code* 1906, *section* 4067.

Code 1906, section 4067, providing that "a mortgage or deed of trust conveying the income of future earnings or the rolling stock of a railroad company shall not be valid against liabilities incurred by such company as a carrier of freight and passengers, or for damages sustained by persons or property," has no application, in a suit against a railroad company based on the theory that it was a reorganization of a company liable to complainants, where under the agreed statement of facts such a theory is not sustained. *Ib.*

3. *Corporations. Liability of directors. Debts in excess of capital stock. Code* 1906, *section* 924.

Under section 924, Code 1906, making directors of corporations individually liable for debts of the corporation "contracted" by them in excess of the paid in capital stock of the corporation, in order to hold a director personally responsible, he must have been one of those directors, who concurrently acting as such and constituting a majority, consented to the debt. *Mann's Mercantile Co. v. Smith*, 16.

4. *Sheriffs and constables. Killing fugitive misdemeanant.*

A sheriff and the sureties on his official bond are liable in a civil action for damages arising from the intentional or negligent shooting of a misdemeanant who flees to avoid arrest. *Johnson v. Cunningham*, 140.

5. *Sheriffs and constables. Mode of arrest.*

A sheriff pursuing a fleeing misdemeanant who willfully and intentionally fires a modern pistol of high power in the direction of such fugitive and the bullet strikes and kills him, is guilty of a negligent, intentional and willful wrong for which he and his bondsmen are liable, whether he shot directly at the fugitive or the bullet struck a twig and glanced and struck deceased. *Ib.*

6. *Improvements. Right to compensation. Code* 1906, *section* 1848.

Code 1906, section 1848, allowing compensation for improvements put upon land, applies only where the party making the improvements is liable to account for rents. *Deanes v. Whitfield*, 237.

LICENSES.

LIABILITY—Continued.

7. *Loans. Misuse by borrowing corporation. Action by stockholders.*
Where a bank loaned money to a corporation, knowing that the money was to be used for a purpose not authorized by the charter of the corporation, this does not in the absence of fraud on the part of the bank, render it liable to a stockholder of the corporation for loss resulting from the misuse of such funds. *Beckett v. Warehouse Co.*, 305.

8. *Connecting carriers. Injury to goods.*
Where goods shipped over connecting lines are delivered to the consignee in a damaged condition, and it is proven that they started on their journey in good condition, the carrier thus delivering them to the consignee will be liable for the damages, unless it shows that the injury did not occur through its fault. *Jordan v. Railroad Co.*, 323.

9. *Telegraphs and telephones. Damages.*
The measure of liability of a telegraph company for failure to transmit a message to plaintiff's father to meet a train with a rig, as plaintiff's child was sick, was properly limited to nominal damages, where it was not shown that the child's death was proximately caused thereby, on account of exposure in carrying her to his father's house. *Stark v. Telegraph Co.*, 332.

10. *Anti-trust laws. Action for penalty.*
The fact that in a suit by the state against several oil companies for the penalty for violating the anti-trust statute, the bill prayed for the imposition of separate and joint penalties was immaterial, since each is liable for the full penalty. *Standard Oil Co. v. State*, 377.

11. *Transfer of stock. Bona fide purchaser without notice.*
A corporation by issuing a second certificate of stock without surrender and cancellation of the first, becomes liable to any subsequent purchaser for value of the first, who was without notice of the issuance of the second. *Bank v. Bank*, 853.

See CONTRACTS; HEPBURN ACT; NOVATION.

LICENSES.

1. *Occupation. Advertising patent medicines. Laws* 1912, *chapter* 99, *section* 2.
Under laws 1912, chapter 99, section 2, imposing a privilege tax upon "each person, firm or corporation selling or advertising by

LIENS.

LICENSES—Continued.

harangue, in any town or city patent medicines, except a licensed merchant or druggist selling from his place of business," where a party sold a patent medicine to a drug company who had a regular place of business, and agreed as a part of the consideration of the purchase, to assist in advertising it, and accordingly addressed from a platform in front of the company's store, crowds which were attracted by a negro playing and singing, advertising the merits of the medicines, and inviting the crowds to go into the store, where sales were made by employees of the store, such acts did not violate the statute. *Hass v. State*, 439.

2. *Occupation. "Oil depot." Code* 1906, *section* 3843.
Under Code 1906, section 3843, imposing a license tax of fifty dollars upon each oil depot and, providing that "each building or tank where oil is stored for delivery shall be deemed a depot, but this provision shall not apply to merchants who retail oil to their customers in the regular course of business," where defendant had or used a room or building erected by an oil company and bearing its sign, in which it stored oil and gasoline which defendant as its agent, retailed therefrom for a commission, accounting to its regular agent, in such case defendant did not maintain an "oil depot" so as to be liable for the tax. *State v. Pons*, 612.

3. *Privilege tax. Penalty for non-payment.*
There is nothing in chapter 104, Laws 1912, levying a privilege tax on certain places, and providing in section 7 that all laws and parts of law in conflict therewith are repealed, in conflict with section 3910, Code 1906, which provides that all persons liable for a privilege tax who shall fail to procure the license during the month in which it is due, shall be liable for double the amount of the tax and hence the code section applies to taxes levied under such chapter 104, Laws 1912. *Bennett v. Jones*, 880.

LIENS.

1. *Attorney and client.*
Where the sole beneficiary under an unprobated will contracted with an attorney for services for its probate, and obligated herself to pay to the attorney one-half of whatever might be decreed to be the interest of the beneficiary under such will and bargains, sells, assigns, transfers, and sets over to the attorney one-half of whatever lands, moneys, choses in action, and personal property she may be entitled to receive under a decree

LIENS—Continued.

of court or settlement such a contract does not give to the attorney a lien on the property under the will, and he does not acquire an interest in the will, and cannot propound it for probate. *Cochran v. Henry*, 233.

2. *Judgment. Property covered. Code* 1906, *section* 819.
The lien of an enrolled judgment upon the property of a defendant as provided in section 189, Code 1906, does not extend to cover the right to receive or recover a debt. *Bryan v. Hardware Co.*, 255.

3. *Enforcement.*
The jurisdiction of equity is inherent to enforce the lien given mutual fire insurance companies by the Laws 1912, chapter 171, section 18, upon property insured and it is unnecessary for the statute to expressly confer such jurisdiction. *Huggins v. Fire Ins. Co.*, 650.

4. *Vendor and vendee. Agreement to support grantor.*
There is no implied equitable lien in favor of a grantor of real estate to secure a consideration therefor, which is an agreement to support the grantor during life. The reason being that the charge is too uncertain, and indefinite in character. *Lee v. McMorries*, 889.

LIFE TENANTS.

Improvements. Right to compensation. Code 1906, *section* 1848.
The tenant of a life estate, making permanent and valuable improvements, has no claim upon the remainderman for reimbursement. *Deanes v. Whitfield*, 273.

See ADMINISTRATION OF ESTATES.

LIMITATIONS OF ACTIONS.

See STATUTES OF LIMITATION.

MASTER AND SERVANT.

1. *Injury to servant. Negligence of employee.*
Where it was the duty of the coemployee to instruct another employee and to keep the machinery in proper condition, and his attention was directed to the defect which caused the injury, his failure to repair the defect was the negligence of the master. *Newman Lumber Co. v. Dantzler*, 31.

MEDICINE SHOWS—MONOPOLIES.

MASTER AND SERVANT—Continued.

2. *Trial. Misleading instructions. Application to evidence.*
In a suit for personal injury by a servant against the master it was error to grant an instruction for the plaintiff "that if the jury believe from the evidence that the defendant is guilty of the acts of negligence complained of in the declaration they will find for the plaintiff," where there were two counts in the declaration and there was no evidence to support the first count. *Ib.*

3. *Fellow servant. Notice of incompetency. Negligence of fellow servant.*
In a suit by a servant against the master for injuries alleged to have been caused by the negligence of an incompetent fellow servant, it is necessary for plaintiff to show, (a) that his fellow servant was incompetent; (b) that the master knew, or should have known, that he was incompetent; (c) that the master failed to discharge the incompetent servant; and (d) that plaintiff was injured because of the negligence of this servant. *Ingram Day Lumber Co. v. Joh*, 43.

4. *Same.*
Where the notice of incompetency given to the master by the plaintiff was only that the fellow servant was not a first-class striker, and for this reason plaintiff could not turn out his share of the work, there was nothing in this to show that the fellow servant was a man whom the master might reasonably anticipate would injure the workmen whom he was helping. *Ib.*

5. *Disobedience of rules. Ground for discharge.*
The owner has the right to make reasonable rules for the government of his plantation and where a manager of such plantation refuses to obey these rules the owner has the right to discharge him. *Corley v. Rivers*, 67.

MEDICINE SHOWS.

See LICENSES.

MONOPOLIES.

1. *Contracts in restraint of trade. Validity.*
Our anti-trust statute was only intended to embrace within its provisions those contracts in restraint of trade, which were invalid as against public policy before the enactment of the statute. *Railroad Co. v. Crawford*, 355.

MONOPOLIES.

MONOPOLIES—Continued.

2. *Trust and combinations in restraint of trade. Jurisdiction.*
Where several oil companies formed a combination whereby the stock of each was transferred to the Standard Oil Company, the purpose being to destroy competition and monopolize the trade in petroleum throughout the United States, and each of the subsidiary companies was assigned certain territory in which to do business, the state of Mississippi being assigned to the Standard Oil Company of Kentucky, and such company, in furtherance of the conspiracy and to destroy competition, on numerous occasions offered petroleum for sale on the same day, in different localities of the state at different prices. In such case the conspiracy being one having as one of its objects a monopoly of that portion of the trade lying wholly in Mississippi, to be accomplished, in part at least, by transactions lying wholly within the state, was punishable under the laws of the state. *Standard Oil Co. v. State*, 377.

3. *Interstate and intrastate commerce. Concurrent power to govern.*
A conspiracy which has for its object the creation of monopoly only in that part of the commerce in a commodity which is intrastate is subject only to the laws of the state affected thereby; but one having for its object the creation of a monopoly in both interstate and intrastate commerce in a commodity is necessarily subject to the laws both of the general government and of the state affected thereby. *Ib.*

4. *Interstate commerce. Concurrent power to punish.*
A conspiracy to monopolize both inter and intrastate commerce in a commodity but to be consummated by dealing with the commodity only while it is the subject of an interstate transaction is punishable only under the laws of the general government. *Ib.*

5. *Intrastate commerce. What law governs.*
A conspiracy to monopolize trade in any commodity, to be punishable under state laws, must have as one of its objects a monopoly in the intrastate trade, to be accomplished in part at least by transactions which are also wholly intrastate. *Ib.*

6. *Illegality of contracts of sale. Recovery of purchase price.*
Even though a contract providing that "we will not sell any other patterns than the McCall Patterns received from you during the term of the contract order," violates our anti-trust laws, still the purchaser is not released thereby from the payment of the amount due by it for patterns received. *McCall Co. v. Parson, Etc., Co.*, 865.

MORTGAGES AND MORTGAGEES.

1. *Railroads. Liabilities secured. Scope of relief. Code* 1906, *section* 4067.

Code 1906, section 4067, providing that "a mortgage or deed of trust conveying the income of future earnings or the rolling stock of a railroad company shall not be valid against liabilities incurred by such company as a carrier of freight and passengers, or for damages sustained by persons or property," has no application, in a suit against a railroad company based on the theory that it was a reorganization of a company liable to complainants, where under the agreed statement of facts such a theory is not sustained. *N. O. M. & C. R. Co. v. Carter*, 1.

2. *Fixtures. Machinery. Rights of mortgagees.*

Where the machinery of a laundry attached by screws, rods, and bolts to the floor or ceiling of a building, or to concrete or brick foundation, in order to support and steady it, and which was placed in the building solely for use in connection with the laundry business, none of such machinery being necessary for the use of the building, as each and all of it can be removed without injury to the building, such machinery was personal property, and not fixtures in the sense that they became a part of the building in which they were placed and in such case a mortgagee of the house and lot in which the machinery was placed had no claim on such machinery as against a subsequent mortgage of the same. *Laundry Mach. Co. v. Life Ins. Co.*, 108.

MULTIFARIOUSNESS.

Equity. Pleading. Multifariousness. Code 1906, *section* 598.

Under Code 1906, section 598, so providing, the uniting in the same bill of several distinct and unconnected matters of equity against the same defendant does not render the bill multifarious. *N. O. & N. E. R. Co. v. N. O. G. N. R. Co.*, 453.

See INDICTMENT.

MUNICIPAL CORPORATIONS.

1. *Defective streets. Negligence.*

A town is liable to a traveler in damages for injuries caused by being thrown from his buggy by a wheel falling into a hole in the street, where the officials of the town knew of the defective condition of the street, either by reason of driving over it or by having their business place near it, in such case the town

NEGLIGENCE.

MUNICIPAL CORPORATIONS—Continued.

officials are negligent in permitting the street to remain in a defective condition. *Saxon v. Town of Houlka*, 161.

2. *Ordinances. Validity.*
An ordinance of a municipality, which fully expresses its purpose and was enacted under a special charter, which authorized the city council to make and establish rules for its own government and to appoint the time for its meetings, is not invalid because it was not numbered, or because there was no title; or because the records did not show that it was reduced to writing and passed by a yea and nay vote, where it was undoubtedly adopted by a majority of the council. *City of Corinth v. Sharp*, 696.

3. *Same.*
It was no valid objection to a municipal ordinance because it was not shown to have been published, where there is no provision in the charter requiring the publication of ordinances. *Ib.*

4. *Ordinances. Proof of passage.*
Where the proof in a case contains an extract from the minutes of the city, which were duly signed by the city clerk and the clerk and the charter gives the council the authority to appoint a clerk to register its proceedings and ordinances and it appears that the ordinance was duly registered by the clerk, and the copy from the book where the ordinance is recorded plainly shows that it was adopted, the time of its passage, and the page of the record. Its enactment and record was sufficiently established. *Ib.*

See CITY OF CORINTH.

NEGLIGENCE.

1. *Master and servant. Injury to servant. Negligence of employee.*
Where it was the duty of the coemployee to instruct another employee and to keep the machinery in proper condition, and his attention was directed to the defect which caused the injury, his failure to repair the defect was the negligence of the master. *Newman Lumber Co. v. Dantzler*, 31.

2. *Master and servant. Fellow servant. Notice of incompetency.*
In a suit by a servant against the master for injuries alleged to have been caused by the negligence of an incompetent fellow servant, it is necessary for plaintiff to show, (a) that his fellow servant was incompetent; (b) that the master knew, or should have known, that he was incompetent; (c) that the mas-

NEW TRIAL.

ter failed to discharge the incompetent servant; and (d) that plaintiff was injured because of the negligence of this servant. *Ingram Day Lumber Co. v. Joh*, 43.

3. *Same.*

The fact that a blacksmith's helper, or striker, in cutting bolts, struck a glancing or "nudging" blow which caused the hammer to slip off the object struck and injure plaintiff, did not constitute negligence in the discharge of his duties as such an accident may occur with the most skilled and prudent workman. *Ib.*

4. *Arrest of fugitives. Discharge of firearms.*

The custom among officers to fire their pistols when pursuing fugitives, even when they are misdemeanants as a ruse to prevent their further flight, is a reckless use of firearms. *Johnson v. Cunningham*, 140.

5. *Municipal corporation. Defective streets.*

A town is liable to a traveler in damages for injuries caused by being thrown from his buggy by a wheel falling into a hole in the street, where the officials of the town knew of the defective condition of the street, either by reason of driving over it or by having their business place near it, in such case the town officials are negligent in permitting the street to remain in a defective condition. *Saxon v. Town of Houlka*, 161.

6. *Telegraphs and telephones. Willful neglect.*

It was not reckless, willful or intentional negligence, where a telegraph company's agent simply forgot to deliver a message to the operator for transmission, the message being a request to meet the sender with a rig as his child was sick. *Stark v. Telegraph Co.*, 332.

NEW TRIAL.

Newly discovered evidence. Confession of another.

Where a defendant convicted of crime made a motion for a new trial, on the ground of newly discovered evidence, and supported his motion by affidavits that another person had confessed that he committed the crime for which the defendant had been convicted and had pleaded guilty to the same, the motion should be sustained. *Roundtree v. State*, 166.

NOVATION.

Substitution of new debtor. Incomplete negotiations.

Where defendant, who had contracted to purchase patterns from plaintiff for five years, discontinued business and thereupon, plaintiff's agent, defendant, and a third party entered into an agreement that defendant should be released from liability on the contract; that its stock of patterns should be turned over to the third party, who, with certain modifications would assume the contract, but this contract was to be submitted to plaintiff for his approval and was approved by plaintiff, and returned for the signature of defendant and the third party, who repudiated it on the ground that it differed from the agreement made by the agent; defendant was not relieved from liability on the original contract thereby, even though the agent was authorized to enter into a contract of that character, since he did not assume in this matter to exercise such authority. *McCall Co v. Parson, Etc., Co.*, 865.

OCCUPATION TAXES.

See LICENSES.

OFFICIAL MISCONDUCT.

See DELEGATION OF DUTY.

ORDINANCES.

See CITY OF CORINTH.

PARTITION.

1. *Judgment. Conclusiveness. Res judicata.*

Where in a suit for partition, the widow of one of the heirs was complainant and her adopted daughter a defendant, and in that suit the widow voluntarily submitted her rights, as against such daughter, to adjudication, and the court having jurisdiction of the parties and subject-matter erroneously decreed that the adopted daughter was entitled to inherit a part of the land sought to be partitioned, from her father, such decree not having been appealed from, and the time for appeal having expired, was conclusive and *res judicata* of that issue. *Fisher v. Browning*, 729.

2. *Nature of remedy. Sale of land.*

The sale of land for a partition is regulated by statute, and is not dependent upon the common law, or the general principles of equity. *Product & Mfg. Co. v. Buckley*, 897.

PASSENGERS.

Carriage of passengers. Who are "passengers." Code 1906, *section* 4054.

Where plaintiff chartered a car of a railroad for the transportation of his household goods and a horse and cow the contract providing "one man allowed free as caretaker" and plaintiff took his place in the freight car with his property, in such case he was a passenger upon a freight train and the railroad company was not liable, except for gross negligence and carelessness of its servants as provided in Code 1906, section 4045. *Railroad Co. v. Winn*, 755.

PERJURY.

Subornation of perjury. Evidence.

Where an indictment charged that accused attempted to induce one Bardsley to commit perjury by swearing that he, Bardsley had not bought cocaine from one Cox and to act crazy before the grand jury, a conviction of subornation of perjury cannot be had unless the state shows by evidence: First, that Cox had sold Bardsley cocaine, and second, that Bardsley knew that Cox was the person who sold him the cocaine, and third, that accused knew that in the event Bardsley testified that he did not know who sold him the cocaine, he would be stating that which would be false. *Smith v. State*, 404.

PERSONAL PROPERTY.

See MORTGAGES AND MORTGAGEES.

PLEADING.

See PRACTICE AND PROCEDURE.

POSSESSION.

See INTOXICATING LIQUOR.

POWER OF CONGRESS.

Commerce. Regulations. Shipment of liquors.

The power of congress to prescribe what commodities shall be legitimate subjects of interstate commerce is undoubted, and the Webb-Kenyon Act (March 1, 1913, chapter 90, 37 Stat. 699) is a proper exercise of such power. *American Express Co. v. Beer*, 528.

POWERS OF COURTS—PRACTICE AND PROCEDURE.

POWERS OF COURTS.

Physical examination. Power to require.

The circuit court has no power either by statute or the common law, to require the plaintiff in an action for damages for personal injury, to submit to a physical examination by physicians appointed by the court. *Y. & M. V. R. R. Co. v. Robinson*, 192.

PRACTICE AND PROCEDURE.

1. *Term of courts. Civil terms. Laws* 1910, *chapter* 105.

Under chapter 105, Laws 1910, fixing the terms of court in Sunflower county and providing that the first twelve days of each term shall be for civil business and the last twelve days for criminal business, where a civil case was tried during the first twelve days, but a motion for a new trial in the case was decided in the last twelve days this was not error, since the division of time was for convenience, and in nowise limits the power of the court to try a case properly within its jurisdiction. A judge cannot however ignore the division of time, when to do so would deprive a party to a lawsuit of any substantial right. *Mann's Mercantile Co. v. Smith*, 16.

2. *Master and servant. Appeal and error. Admission of evidence. Misleading instructions.*

In an action by a servant against the master for personal injury where the gist of the first count in the declaration is that defendant was negligent in its failure to properly instruct and warn plaintiff of the dangers incident to the operation of the machine he was employed to operate, the fact that this count further describes in circumstantial detail the machinery, its location, character and the manner in which the same was operated, does not make the count duplicitous. *Newman Lumber Co. v. Dantzler*, 31.

3. *Same.*

Where the gist of the second count in such declaration is that during the operation of the machinery a dangerous defect developed in the machinery, and this was known to defendant, and it was then the duty of the master to repair the same, and failing to do so, the master was negligent and responsible for all damages resulting from the neglect of its duty to plaintiff, the fact that this count further reiterates a description of the machinery and the method of its operation, which other averments were intended to negative the idea that plaintiff, after he knew of the danger, assumed the risk of continuing the work, does not make such count duplicitous. *Ib.*

PRACTICE AND PROCEDURE.

PRACTICE AND PROCEDURE—Continued.

4. *Pleading. Amendment. Trial.*
It is proper for the court to allow defendant to amend his plea after the evidence was introduced where such amendment in no way prejudiced plaintiff's cause. *Bank v. Smith*, 105.

5. *Physical examination. Power to require. Courts.*
The circuit court has no power either by statute or the common law, to require the plaintiff in an action for damages for personal injury, to submit to a physical examination by physicians appointed by the court. *Y. & M. V. R. R. Co. v. Robinson*, 192.

6. *Pleading. Bill of particulars. Evidence.*
Where plaintiff, in ejectment, claimed through a tax deed, defendant was not required to amend his bill of particulars showing his chain of title, in order to prove that the taxes for the nonpayment of which the sale in question was made, had been levied under an unconstitutional act, to show the invalidity of plaintiff's claim. *Mitchell v. Tubb*, 221.

7. *Interpleader. Effect. Code* 1906, *section* 772.
The interpleader provided for in Code 1906, section 772, is merely a substitute for the original interpleader in equity, which could not be sustained unless the interpleader was a naked trustee of the property for which there were two or more claimants, to either of whom he was willing to deliver it, and hence a defendant, who filed a bill of interpleader, cannot, when the party interpleaded did not appear and set up his claim, complain that the court awarded judgment for plaintiff, for the filing of the interpleader admitted defendant's liability. *McAlister Bros. & Co. v. Sanders*, 283.

8. *Clerks and courts. Compensation. Penalty and forfeitures of fees. Rule* 1.
When a clerk of the lower court fails to incorporate the bill of lading introduced in evidence in the lower court in his transcript to the supreme court, and gives no excuse for his failure so to do, under rule No. 1 of the supreme court, his fees for making up the transcript will be disallowed. *Jordan v. Railroad Co.*, 323.

9. *Monopolies. Anti-trust law. Action for penalty.*
Where a bill was filed by the state against several oil companies for the penalty for the violation of the anti-trust law of the state, it was not error for the court to refuse to eliminate from the bill, facts which also disclosed a violation of the federal anti-trust law. When the two offenses against the federal and the

PRACTICE AND PROCEDURE.

PRACTICE AND PROCEDURE—Continued.

state law are part and parcel of the same conspiracy. *Standard Oil Co. v. State*, 377.

10. *Appearance. Jurisdiction acquired. Special appearance.*
Where a summons or citation or the service thereof is quashed on motion of a defendant, he gains a continuance of the cause, but nothing else, since, as provided by Code 1906, section 3946, his appearance for the purpose of the motion gives the court jurisdiction of his person for all purposes of the case. *Ib.*

11. *Account. Equity. Jurisdiction. Adequacy of legal remedy. Multifariousness. Code* 1906, *section* 598.
Where complainant railway company, while operating its trains over defendant's railway tracks under a joint agreement, sustained a wreck and a collision due to the negligence of the servants of defendant, thereby suffering great damages and being compelled to pay large sums of money to diverse persons, and its rights may depend upon the statement of a mutual account involving many items. In such case complainant not having a full, adequate and complete remedy at law for damages may maintain a suit in equity for the statement of a mutual account. *N. O. & N. E. R. Co. v. N. O. G. N. R. Co.*, 453.

12. *Equity. Bill.*
Only such decree can be entered as is supported by the allegations of the bill. *Blythe v. Simmons*, 510.

13. *Eminent domain. Statutory proceedings. Compliance. Construction of statutes. Code* 1906, *section* 1006.
In eminent domain proceedings every essential prerequisite to the jurisdiction called for by the statute must be strictly complied with, and this must affirmatively appear on the face of the proceedings, in order to give them validity, but a strict compliance with the statute does not necessarily mean a literal and exact compliance. A substantial compliance will suffice. *Tel. Co. v. Railroad Co.*, 626.

14. *Bankruptcy. Effect of pending actions. Dismissal of appeal.*
Where after the rendition of a final decree in the lower court enjoining defendants from instituting or prosecuting sales on certain promissory notes, the case was appealed to the supreme court, and pending such appeal, one of the appellants was adjudicated a bankrupt and was discharged, he thereby ceased to have any interest in the notes, though they were not scheduled, and hence the appeal as to him should be dismissed. *Jones v. Barnes*, 800.

See AMENDMENTS; INJUNCTION.

PURCHASER FOR VALUE.

See LIABILITY.

QUALIFICATIONS OF JUDGES.

Relationships. Constitution 1890, *section* 165, *Code* 1906, *section* 120.

Under Constitution 1890, section 165, and Code 1906, section 120, so providing, a chancellor is disqualified from presiding in a case where he is connected by affinity or consanguinity with parties to the proceeding, without the consent of all parties, and this is true whether his decision be right or wrong. *Dodd v. Kelly*, 471.

RAILROADS.

1. *Injuries to animals on the track. Care required.*

A railroad company, in operating its trains, is only required to use reasonable care to prevent injury to animals on its tracks, such care as a discreet man would exercise, to avoid injury. *Railroad Co. v. Morrison*, 300.

2. *Contracts in restraint of trade. Validity.*

Since a railroad company is not bound to furnish facilities for the loading of logs between stations, it may, where it had permitted the loading of logs at such points, undertake the business itself, to the exclusion of all others and having this right it could employ another to do that which it could itself lawfully do, and such would not constitute an illegal monopoly. *Railroad Co. v. Crawford*, 355.

3. *Licenses for loading privileges.*

Because a railroad company had for a long time allowed private individuals the privilege of loading at points between its stations and plaintiff had built up a profitable business under that arrangement, does not give plaintiff any right to insist that the privilege be continued and he cannot object that the railroad company thereafter gave another the exclusive license to load logs between stations, since a repetition of favors for accommodation cannot constitute a foundation for a valid claim to their enjoyment as a right. *Ib.*

RAPE.

Criminal law. Instructions. Cure by other instruction. Oral instructions.

The giving of an erroneous instruction for the state in a trial for rape "that the crime of rape may be proven by circumstances,

RAPE—Continued.

and it is not necessary to have eyewitnesses to the deed, if circumstances are sufficient to convince the jury beyond a reasonable doubt, that the accused party is guilty," is not cured by the giving, at defendant's request, of an instruction, that to convict, the state must prove to the jury's satisfaction beyond a reasonable doubt that the defendant had sexual intercourse with prosecutrix, and that the injury was caused in no other way, and that if it failed to do this, the verdict should be not guilty, since the defendant's instruction did not in any way mention circumstantial evidence. *Simmons v. State*, 463.

RECOUPMENT.

Set-off and counterclaim. Necessity of mutuality of claims.

Recoupment is a defensive, rather than an offensive, proceeding. It has in view a claim in behalf of each contending party. It will not apply, where it is necessary to show that plaintiffs have no right of action, in order to sustain defendant's claim. *Hoover Commercial Co. v. Humphrey*, 810.

RECOVERY.

1. *Life estate. Sales. Rights of purchaser. Improvements.*

One who purchases land from the tenant for life, who held under a will of record in the county in which the land was situated at that time, was chargeable with notice that he purchased from a life tenant and could not recover from the remainderman for improvements placed on the land, although before his purchase the land had been included in a new county and there was no record of the will in such new county. *Deanes v. Whitfield*, 273.

2. *Gaming. Recovery of payments.*

Under Code 1906, providing that any person making any contract of the kind commonly called "futures" and who by reason thereof shall lose any money and pay or deliver it, may recover such money from the person "knowingly" receiving it, the knowledge of a cotton broker's agent through whom negotiation and dealings in future were had, was the knowledge of the broker. *Weld v. Austin*, 279.

3. *Fraud. Damages. Evidence. Sufficiency.*

Where a defendant fraudulently induced complainants to execute notes which were negotiated to a bank, the fact that complainant

RECOVERY—Continued.

adjusted their difference with the bank, which was suing on the notes, will not entitle complainant to recover the full amount of the notes from the defendant, where it did not appear how the settlement was made or what amount was paid the bank pursuant thereto. *Blythe v. Simmons*, 510.

4. *Sales. Remedies of buyer. Breach of warranty. Parties liable. Defenses.*

Where a purchaser bought an automobile from a nonresident, which was shipped consigned to the seller, and a bill of lading with draft on the purchaser for the purchase price was assigned to a bank, the purchaser was thereby compelled to pay the purchase price before getting possession of the car, and the fact that he did so, does not preclude him from thereafter bringing suit to recover for a breach of warranty. *Auto Co. v. Sturges*, 848.

RES ADJUDICATA.

See PARTITION.

RIGHT OF INHERITANCE.

Insurance. Children. Code 1906, *section* 1655.

Under the Constitution and by-laws of a mutual benefit association, providing that benefits should be payable only to certain relatives including "children," an illegitimate child of a female member is not excluded from sharing the benefits, in view of section 1655, Code 1906, which provides that illegitimate children shall inherit from their mother. *Shelton v. Minnis*, 133.

RULES OF SUPREME COURT.

Clerks and courts. Compensation. Penalty and forfeitures of fees.

When a clerk of the lower court fails to incorporate the bill of lading introduced in evidence in the lower court in his transcript to the supreme court, and gives no excuse for his failure so to do, under rule No. 1 of the supreme court, his fees for making up the transcript will be disallowed. *Jordan v. Railroad, Co.*, 323.

SALES.

See CONTRACTS; FRAUD; INTOXICATING LIQUOR.

SCHOOLS AND SCHOOL DISTRICTS.

Separate districts. Review of decision. Code 1906, *section* 80.

Under section 80, Code 1906, providing that any person aggrieved by judgment or decision of the board of a city, town, or village may appeal to the next term of the circuit court of the county, and may embody the facts and decision in the bill of exceptions, which shall be signed by the person acting as president of the municipal authorities, where the bill of exceptions was not taken and signed during the term of the municipal board at which the order complained of was passed, and it does not appear that the time for preparing and perfecting the bill was extended, into the vacation following the term. The mayor could properly refuse to sign a bill subsequently presented, even though the applicant had no notice that the matter had been presented to the board or of the passage of the order. *Hathorn v. Town of Woodville*, 589.

SERVICE OF COURTS.

Judicial notice. Appointment of agent.

In the absence of a certified copy of the instrument constituting and appointing the commissioner of insurance its "true and lawful attorney," there is no way by which the court could judicially know that the commissioner was authorized to acknowledge service for an insurance company. *Fire Ins. Co. v. Sayle*, 169.

SERVICE OF PROCESS.

Insurance. Foreign corporation. Proof of appointment of attorney in fact. Code 1906, *section* 2606.

Under Code 1906, section 2606, so providing, the appointment of the commissioner of insurance as attorney in fact for a foreign insurance company for the service of process, can be proved only by a certified copy of such appointment. *Fire Ins. Co. v. Sayle*, 169.

SET-OFF.

See COUNTERCLAIMS.

STATUTES OF LIMITATION.

Limitation of actions. Code 1906, *section* 3114. *Applicability.*

Section 3114, Code 1906, providing that suit cannot be maintained in this state on a cause of action accrued in another state, where

STATUTES AND STATUTORY CONSTRUCTION

STATUTES OF LIMITATION—Continued.

defendant has resided before residing in this state, if under the statute of limitations in that state, the action cannot there be maintained, applies only where a nonresident, in whose favor the statute had accrued, afterwards removes into this state, and hence a railroad company which, during the period pleaded as a bar, was operating a railroad in this state and therefore suable as a resident here, cannot plead said statute against an action brought in this state for personal injury inflicted in another state, where the statute of limitations would, if suit were there brought, bar the action. *N. O. G. N. R. R. Co. v. Fortenberry*, 79.

STATUTES AND STATUTORY CONSTRUCTION.

1. *Banks and banking. Criminal offenses. Receiving deposits after insolvency.*

Where pending a decision of the board of directors to liquidate the bank because of its financial condition, the cashier received all deposits offered, but kept the same separate from the funds of the bank by pinning the money received from each depositor to the deposit slip and placing the same in a box, and after the appointment of a receiver, the identical money was returned to each depositor with a single exception, and where the failure of that depositor to call for and receive his deposit was the result of his failure to receive a notice to call at the bank and receive his deposit, in such case the cashier did not receive any deposit in violation of the statute. *Sively v. State*, 118.

2. *Board of supervisors. Appeal from decisions. Limitation.*

Where appellant had lost by limitation the right of appeal to the circuit court, from an order of the board of supervisors, they could not by again going before the board with practically the same petition and for the same purpose, and having entered again the former judgment, the right of appeal from which had been lost by limitation, obtain again a right of appeal. *Robinson v. Itawamba County*, 352.

3. *Contracts in restraint of trade. Validity.*

Our anti-trust statute was only intended to embrace within its provisions those contracts in restraint of trade, which were invalid as against public policy before the enactment of the statute. *Railroad Co. v. Crawford*, 355.

See LICENSES; STATUTES OF LIMITATIONS.

STOCK AND STOCKHOLDERS.

Corporations. Actions. Conditions precedent.

A minority stockholder of a corporation need not apply, as he is ordinarily required to do, to the directors or to the stockholders for redress before bringing a suit for the recovery of money misused where the directors, who have used the funds of the corporation for a purpose not authorized by its charter, own or control the majority of the stock. *Beckett v. Warehouse Co.*, 305.

STREETS AND HIGHWAYS.

1. *Law of the road. Code* 1906, *section* 4412. *Standing teams.*

Whether Code 1906, section 4412, regulating the passage of vehicles on highways applies to streets in a city or not, the same rule there prescribed has grown into a custom which as a part of the common law, is applicable to streets and the courts will take judicial knowledge of this custom. *Palotta v. Light & Traction Co.*, 61.

2. *Same.*

Where the driver of a vehicle driving on the right side of a street finds a vehicle already on that side he is justified in turning to the left, since "that which is not otherwise lawful, necessity makes lawful." *Ib.*

3. *Same.*

A traveler who uses a street in the ordinary way is not guilty of a failure to exercise proper care and diligence in driving over a defective part of the street, even though he knows it is not in general good condition, but does not know of a hole therein which is covered with water and mud. *Saxon v. Town of Houlka*, 161.

SUPERSEDEAS.

Acquiescence in decree by appellant. Acts constituting.

Where complainant appealed without *supersedeas* from a decree, directing a sale of land to pay the amount due to a defendant and to apply the balance to complainant's claim, purchased the land for his own protection at the commissioner's sale, which sale was ordered by the defendant pending the appeal, by such purchase complainant did not acquiesce in the decree, and did not release the errors relied on in his appeal. *Bank of Canton v. Hesdorffer*, 709.

SUPREME COURT.

1. *Record.*

Where the record on appeal does not disclose that the circuit judge made statements to the jury attributed to him in the assignment of errors the supreme court will not consider such assignment. *Akroyd v. State*, 51.

2. *Findings. Conclusiveness.*

The supreme court will not set aside the verdict of a jury, finding the facts of a case, merely because it is of the opinion that the verdict was contrary to what that court deemed the weight of evidence. *St. L. & S. F. R. R. Co. v. Bowles*, 97.

3. *Decisions reviewable. Academic question.*

The supreme court will not consider or decide purely academic or abstract questions of law in cases appealed by the state after acquittal. *State v. Jones*, 462.

4. *Decisions. Review.*

The supreme court will not after a case had been finally disposed of, enter an order, based solely on the recollection of the judges composing that court, that in reaching its decision the court did or did not take into consideration certain arguments advanced on points raised by counsel engaged in the cases especially where it cannot be determined upon what points the court agreed, because the matter was not considered in conference. *Wheeler & Silber v. Drainage Dist.*, 481.

5. *Law of the case. Federal question.*

The law of the case rule has no application in cases of a second appeal to the supreme court of the state, where the question involved arises under the Constitution and laws of the United States; the supreme court of the United States having final jurisdiction, and the state court being found by and required to follow its decisions in such matters. *Railroad Co. v. State*, 597.

6. *Rules of decision. Stare decisis.*

A former decision of the supreme court announcing a rule of property should not be departed from unless the rule therein announces it is not only manifestly wrong but mischievous. *Product & Mfg. Co. v. Buckley*, 897.

SURPLUSAGE.

See VERDICTS.

TAXES AND TAXATION.

1. *Code* 1906, *section* 1983. *Sale of land. Presumptions. Prima facie evidence.*

Under Code 1906, section 1983, so providing a conveyance made by tax collectors to an individual purchaser of land at a sale for taxes, and the list of lands sold to the state at such sale, are *prima facie* evidence that the assessment and sale of the land was legal and valid, and where there is a valid existing law providing for the taxation and sale for delinquent taxes where the land in question is sold to the state, the list of lands sold to the state and introduced to support plaintiff's title was *prima facie* evidence that the land was assessed and sold under such valid existing law, notwithstanding the existence of another act providing for the assessment and sale of land for taxes, which was thereafter repealed and declared unconstitutional. *Mitchell v. Tubb*, 221.

2. *Taxation. Assessment. Power of board of supervisors.*

The statute Code 1906, section 4293, fixes the first Monday in July as the time for the filing of the assessment roll made up by the assessor and authorized the board of supervisors to extend the time to the first Monday of August and no longer. Section 4297, Code 1906, requires the supervisors to hold a meeting on the first Monday of August to examine the assessment roll and determine all exceptions thereto and to sit from day to day until the same has been disposed of and all corrections made. Section 4298 provides that, if the assessor be given additional time, the board shall hold its meeting on the first Monday in September. Section 4307 requires the clerk to make two copies of each roll as examined and corrected, one to be transmitted to the auditor of public accounts and the other to the tax collector on or before the first Monday in October. Under these statutes where the board of supervisors failed to enter at their September meeting an increase in the assessment roll, and time of filing the rolls, having been extended, it cannot in the following October, increase an assessment, since its power being wholly statutory, it could not make a change after the time prescribed by the statutes. *Covington County v. Lumber Co.*, 368.

3. *Executors and administrators. Allowances.*

Where taxes paid by an administratrix on land belonging to the estate constituted a personal debt against the owners thereof as well as a lien on the land, she was entitled to an allowance therefor on an accounting. *Davis v. Blumenberg*, 432.

TAXES AND TAXATION—Continued.

4. *Expenditures. Allowances.*
It was proper to allow the administrator credit for taxes paid by him on lands belonging to decedent at the time of his death, where such payment was not only properly made to protect the administrator and decedent's creditors in their right to subject the land to the payment of debts, but inured equally to the benefit of all heirs of decedent. *Ib.*

TAX SALES.

Sale of lands. Statutes. Retrospective effect. Construction.
Acts 1910, chapter 214, which changed the date for tax collectors to file conveyances of land sold for delinquent taxes from the first Monday of April to the first Monday of May, cannot be construed as having a retrospective effect, since there is nothing in the act which disclosed such an intention on the part of the legislature. *Lewis v. Lyon Co.*, 763.

TELEPHONES AND TELEGRAPHS.

1. *Delay in delivering. Damages.*
A failure to deliver a telegram which if delivered would not have constituted a contract, will not entitle the sendee to damages for failing to make such contract. *Postal Tel. Co. v. Criscoe*, 37.

2. *Willful neglect.*
It was not reckless, willful or intentional negligence, where a telegraph company's agent simply forgot to deliver a message to the operator for transmission, the message being a request to meet the sender with a rig as his child was sick. *Stark v. Telegraph Co.*, 332.

TENANTS IN COMMON.

1. *Mutual rights and duties. Acquisition of outstanding title.*
Where a party purchased at an administrator's sale of his intestate land and received a deed from the administrator which was lost and the record thereof destroyed by fire and one of the heirs of the original grantee secured a deed to the land from the heirs of the administrator's intestate, such deed inured to the benefit of all the heirs of the original grantee as tenants in common. *Freeman v. Freeman*, 750.

2. *Right of parties. Partition of land and standing timber.*
Under Code 1906, section 3521, providing for partition of lands held by joint tenants, tenants in common or coparceners, an

TENANTS IN COMMON—Continued.

owner of land, who has sold to another the standing timber thereon is not entitled to a partition since the parties do not hold as provided in the statute. *Product & Mfg. Co. v. Buckley*, 897.

TIMBER SALES.

See DEEDS.

TRESPASSER.

Negligence. Care after injuries.

Where a railroad company takes charge of a trespasser who is injured on its tracks without its fault, it owes to him no higher duty than that dictated by ordinary or common humanity. *Railroad Co. v. Humphreys*, 396.

TRUSTS.

See WILLS.

TRUSTS AND TRUSTEES.

Construction. Interest of cestui que trust. Rights of creditors.

Where testatrix devised all her property to her husband in trust for her children, giving him power to use, control, manage, exchange and sell it or any part thereof and to make deed to the same, until each of the children should arrive at the age of twenty years, when it should be equally distributed among those living, and directing him in the meantime to support them out of the income, a child did not have such an interest in the property as could be subjected by a creditor to the payment of his debt, nor could the court enter a decree directing payment out of the amount which would be due such child when the time for distribution arrived. *Mitchell v. Choctaw Bank*, 314.

VERDICTS.

1. *Conclusiveness.*

The supreme court will not set aside the verdict of a jury, finding the facts of a case, merely because it is of the opinion that the verdict was contrary to what that court deemed the weight of evidence. *St. L. & S. F. R. R. Co. v. Bowles*, 97.

2. *Form and requisites. Surplusage.*

Where in a prosecution for murder, the jury were plainly instructed as to the form and effect of their verdict and returned the

VERDICTS—Continued.

following verdict, "We, the jury, find the defendant guilty as charged, but disagree as to the punishment and ask the mercies of the court" and when the verdict was returned the jury were polled and answered that this was their verdict, and there was no request made to the court for inquiry as to what was meant by the verdict, the court was correct in treating that part of the verdict "and ask the mercies of the court," as surplusage. *Smith v. State*, 574.

WAIVER.

See APPEARANCE.

WEAPONS.

1. *Firearms.*

The highest degree of care is exacted of a person using firearms. They are extraordinarily dangerous, and in using them, extraordinary care should be exercised to prevent injury to others. *Johnson v. Cunningham*, 140.

2. *Arrest of fugitives. Discharge of firearms.*

The custom among officers to fire their pistols when pursuing fugitives, even when they are misdemeanants as a ruse to prevent their further flight, is a reckless use of firearms. *Ib.*

WILLS.

1. *Execution. Subscription by witness. Sufficiency.*

Where, when a will was executed, there were present the testator and two witnesses and one of the witnesses signed with the testator and the other witness was about to sign when the testator requested him to take his acknowledgment to the will as he thought that was better, which was accordingly done, the acknowledgment being on a blank, and the will and acknowledgment were folded together and handed the testator who handed it back to one of the witnesses with the request that he take good care of it, the will in such case was sufficiently attested, since it was apparent that the witness took the acknowledgment and signed his name to the same for the purpose of showing that he witnessed the execution of the will. *Bolton v. Bolton*, 84.

2. *Same.*

Where the names of attesting witnesses to a will are on separate sheets of paper from that of the testator, the will is sufficiently

WILLS—Continued.

attested if these sheets are physically connected, and the same result will follow where the testator, knowing what the signature of the witness was intended to be, handed the two papers, folded together, to one of the witnesses as his completed will. *Bolton v. Bolton*, 84.

3. *Attorney and client. Lien.*

Where the sole beneficiary under an unprobated will contracted with an attorney for services for its probate, and obligated herself to pay to the attorney one-half of whatever might be decreed to be the interest of the beneficiary under such will and bargains, sells, assigns, transfers, and sets over to the attorney one-half of whatever lands, moneys, choses in action, and personal property she may be entitled to receive under a decree of court or settlement such a contract does not give to the attorney a lien on the property under the will, and he does not acquire an interest in the will, and cannot propound it for probate. *Cochran v. Henry*, 233.

4. *Construction. Conditional bequests.*

Where deceased, whose wife had left him and filed a bill for divorce, on entering a hospital to have an operation performed, wrote his parents a letter, stating that if he did not recover, he wanted them to take charge of everything he had; that he loved his wife dearly and that unless she showed that she loved him, he was going to give her up; that as it then stood, he did not want her to have it. He, however, recovered from the operation, and returned to his work as a railroad employee, and was killed. In such case deceased did not intend to make an unconditional bequest of his property, but only a bequest to take effect if he should not recover from the operation he was then about to undergo. *Davis v. Davis*, 245.

5. *Estoppel in pais. Gifts. Delivery.*

Where a testatrix before her death made a valid gift *causa mortis* of certain notes, the donee is not estopped to claim them because of delivering them to the executor, making no claim to them and consenting to the probate of the will, no one being thereby misled to his prejudice or caused to give up anything. *Pace v. Pace*, 292.

6. *Trust for payment of debts.*

A will providing: First, "My will is that all my just debts and funeral expenses by my executors hereinafter named, to be paid

WITNESSES.

WILLS—Continued.

out of my estate as soon after my death as shall by them be found convenient," and second, "After payment of my debts by my executors, who are also trustees herein, a one-sixth interest each of my said estate shall be paid over to my said children from the cash on hand, and as soon as the sale of any property is consummated," did not create an express trust for the payment of debts, rendering it unnecessary for a creditor to have his debts probated and registered within one year after the first publication of notice to creditors as required by Code 1906, section 2107. Since the first clause meant only to direct his executors to pay his debts, which they were required to do by law, the second clause merely directed the payment of debts in preference to the distribution of the estate and this too, was the duty of the executors under the law. *Cohn v. McClintock*, 831.

WITNESSES.

1. *Cross-examination of accused. Extent.*

The state has the right to cross-examine a defendant about matters testified to by him in his examination in chief. *Akroyd v. State*, 51.

2. *Wills. Execution. Subscription by witness. Sufficiency.*

Where the names of attesting witnesses to a will are on separate sheets of paper from that of the testator, the will is sufficiently attested if these sheets are physically connected, and the same result will follow where the testator, knowing what the signature of the witness was intended to be, handed the two papers, folded together, to one of the witnesses as his completed will. *Bolton v. Bolton*, 84.

3. *Cross-examination. Bias or interest.*

It is elementary law that a witness may be examined as to his bias or interest in the case in which he is testifying and where a witness for the state on trial for the unlawful sale of liquor, testifies that he had a little interest in the case and had been indicted for selling whiskey it was reversible error to exclude on cross-examination a question whether he had an understanding that if he would testify against the accused he would not be prosecuted. *Rouse v. State*, 427.